The Law Commission

Consultation Paper No. 122

Legislating the Criminal Code

Offences against the Person and General Principles

A Consultation Paper

HMSO

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper and draft Bill, completed on 5 February 1992, are circulated for comment and criticism only. They do not represent the final views of the Law Commission.

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It may be helpful for the Law Commission, either in discussion with others concerned or in any subsequent recommendations, to be able to refer to and attribute comments submitted in response to this consultation paper and draft Bill. Whilst any request to treat all, or part, of a response in confidence will, of course, be respected, if no such request is made the Law Commission will assume that the response is not intended to be confidential.

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THE LAW COMMISSION

LEGISLATING THE CRIMINAL CODE
OFFENCES AGAINST THE PERSON AND GENERAL PRINCIPLES

A CONSULTATION PAPER

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PART I

INTRODUCTION

FOREWORD

In this Consultation Paper the following abbreviations are used:

"CLRC": the Criminal Law Revision Committee.

"Code team report": *Report to the Law Commission on the Codification of the Criminal Law* (Law Com. No. 143, 1985).

"Draft Code": the draft Bill contained in Volume 1 of *A Criminal Code for England and Wales* (Law Com. No. 177, 1989).

"Code Report": the remainder of Volume 1, and Volume 2, of Law Com. No. 177.

A. THE PURPOSE OF THIS CONSULTATION PAPER

Summary

1.1 By this Consultation Paper the Commission asks for comment on and criticism of the law reform proposals set out in the Criminal Law Bill that is to be found at Appendix A. That Bill deals with two main subjects: non-fatal offences against the person; and certain general principles and defences that affect all crimes. The Bill is the first of a series that will be produced to further the Commission's project for the codification of the whole of the criminal law of England and Wales.

1.2 The Bill is complete in itself as a law reform measure; but it also draws very heavily upon, and is written in the terms and language of, our Draft Code that was published in 1989.[1] Most of the parts of the Draft Code dealt with in this Consultation Paper followed, and built upon, extensive consideration in the past, most notably by the CLRC in its Fourteenth Report on *Offences against the Person*,[2] and we believe, in the light of that earlier law reform work, that there is substantial agreement upon the form that the law on non-fatal offences against the person and general defences ought to take. For that reason, we have not simply issued another Consultation Paper; but have drafted a full Bill, based upon the relevant parts of the Draft Code, that shows in detail how these proposals might be legislated. The Consultation Paper explains the background to, and implications of, the various parts of the Bill; and in Appendix B we provide Explanatory Notes, much more extensive than the usual Notes on Clauses, that identify in respect of each clause of the Bill its origin, and where in the Consultation Paper its implications, and the law that it enacts, are fully explained.

1.3 However, even on a subject that has already received as much discussion as has offences against the person, the Commission would not wish to propose specific legislation without giving the opportunity for further comment and criticism both of the principles of our approach and, in particular, of the detailed terms of the Bill that springs from those principles. That is why the present Bill forms part of a Consultation Paper and not of a final Report. Whilst we will welcome expressions of opinion on any aspect of the Consultation Paper, we are particularly anxious to receive comment based on the terms of the Bill, and on its suitability as a vehicle for early legislation. Further, in the course of our work a number of particular questions have been identified, not all of which were dealt with in the Draft Code or in other earlier work on this subject. We have summarised those

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[1] A Criminal Code for England & Wales, Law Com. No. 177.

[2] Cmnd. 7844 of 1980. The CLRC had the benefit of advice from the judiciary at all levels, and from other bodies. Its recommendations were the subject of further extensive, and broadly favourable, discussion: see for instance [1980] Crim. LR 542.

questions at the end of the Consultation Paper; but we emphasise that we hope for comment on the whole of the Bill, and not merely on those particular issues that we have separately listed.

The Draft Code

1.4 The Draft Code sought to set out in an accessible, comprehensible and consistent form virtually the whole of the law relating to indictable offences. The Draft Code in fact had two major objectives: to restate in a rational form the complex and often antiquated and confusing mixture of common law and statutory provisions in which the criminal law is at present to be found; and to incorporate, in the same format and with the same drafting policy as was used for the rest of the Code, various proposals for the reform of the present criminal law that have been made by official bodies in recent years.

1.5 The clarification and rationalisation of the criminal law is an important objective, not least because of the burden that an obscure and unnecessarily complicated law places on the courts. Some parts of the criminal law will always, necessarily, be difficult; but a law that even the judges find hard to administer threatens not merely waste of time and excessive cost, but also positive injustice. We emphasised these considerations in paragraph 2.5 of the Introduction to Volume 1 of the Code report, which we venture to repeat here:

> "A large and growing number of people are now involved in administering and advising upon the criminal law. One reason for this is that the volume of work in the criminal courts has hugely increased in recent years. To meet this rise, there has been a substantial increase in the numbers of Crown Court judges, recorders and assistant recorders appointed. Many of these judges are recruited from outside the ranks of specialist criminal practitioners. In the magistrates' courts, magistrates depend upon their clerks for advice on the law: in this area too the number of court clerks has risen to try to meet the increased workload. The position of the common law in criminal matters, and in particular the interface between common law and statutory provisions, undoubtedly contributes to making the law obscure and difficult to understand for everyone concerned in the administration of justice, whether a newly-appointed assistant recorder or magistrates' clerk. Obscurity and mystification may in turn lead to inefficiency: the cost and length of trials may be increased because the law has to be extracted and clarified, and there is greater scope for appeals on misdirections on points of law. Moreover, if the law is not perceived by triers of fact to be clear and fair, there is a risk that they will return incorrect or perverse verdicts through misunderstanding or a deliberate disregard of what they are advised the law is. Finally, the criminal law is a particularly public and visible part of the law. It is important that its authority and legitimacy should not be undermined by perceptions that it is intelligible only to experts."

1.6 Quite apart from the need to improve the certainty and accessibility of the criminal law, there is an important constitutional argument in favour of codification. Criminal law controls, by means of state coercion and punishment, the freedom of the citizen to act as he wishes. The terms of that criminal law should therefore, as far as possible, be democratically determined, by Parliament. Judicial application of what Parliament provides will, of course, be necessary as well; but the aim should be to provide a legislative text that enables courts to apply, directly and with certainty, the intentions of Parliament, without the need for recourse to extensive judicial interpretation and discretion. Nowhere are these considerations more apparent than in the law of non-fatal offences against the person where, as we explain in paragraph 7 below, the statutory background is so obscure and outdated that the statutes themselves have been in effect overtaken by a law based entirely on judicial interpretation of those statutes.

1.7 The Commission remains fully committed to the attainment of these benefits of codification, the importance of which has been widely acknowledged since the Com-

mission commenced its codification exercise.[3] That would be achieved by the passing into law of a complete criminal code for England and Wales. We recognise, however, that from a practical point of view the legislation of a Bill as large and wide-ranging as a Criminal Code would be very demanding of Parliamentary time. It would clearly be imprudent to assume that it will be practicable to achieve the enactment of a complete code in the reasonably near future.

The way forward

1.8 The Commission's responsibility for the reform and improvement of the criminal law demands that the need to view the enactment of a complete code as a matter for the longer term should not prevent the achievement of shorter-term objectives. Two such shorter-term steps are, in our view, urgently needed.

1.9 First, it is important to take advantage of the general acceptance of the style, approach and vocabulary of the Draft Code, as set out in Law Com. No. 177, as the method by which reform of the criminal law should be pursued in the future. These principles, first formulated by the Commission's Code team under the leadership of Professor J. C. Smith Q.C., are closely followed in the Bill annexed to this Consultation Paper. Quite apart from the specific reforms that that Bill incorporates, it gives an opportunity for those concerned with determining policy about the criminal law to pass judgement on the application of Code principles, and of the general Code approach, to a specific part of the substantive criminal law.

1.10 Second, there are a number of areas of the criminal law where reform, whether or not as part of a general codification, is a matter of urgent necessity. One of the areas most in need of comprehensive reform is the law of non-fatal offences against the person. It would clearly be wrong to allow uncertainty as to the eventual future of the Code to delay such particular, and urgently required, reforms.

1.11 At the same time, however, such reforms can now be proposed with more confidence, and on a more rational basis, than was possible before the Draft Code was formulated. The Draft Code, by putting the whole of the criminal law, including all the general principles, into one document has simplified the task of understanding how reforms in one area would fit in to the rest of the law. It has also, and in particular, made it possible to decide how much of the "general part" of the criminal law, that deals with principles that are potentially applicable to all substantive offences, should be incorporated in a Bill that reforms a particular part of those substantive offences.

1.12 We are therefore now able to put forward, with some confidence, a Bill that, if enacted, would put a substantial part of the criminal law on a codified basis. In our view, enactment of a Bill along those lines would not only secure immediate and valuable reforms of the law, not least in making the law easier and simpler, and thus more efective and economic, to use; but would also be a major step towards a complete codification.

1.13 In the present exercise the Commission has been fortunate enough to have the assistance, as a special consultant, of Professor Edward Griew, a member of the original Code team. He has made a major contribution to this Consultation Paper.

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[3] These aims were set out in Chapter 1 of the Code team's *Report*, Law Com. No. 143 of 1985, and attracted wide support during the extensive consultation exercise that we conducted on the basis of that report. The outcome of that consultation, and the Commission's policy conclusions resulting from it, are set out in Part 2 of Volume 1 of Law Com. No. 177: "The Case for a Criminal Code".

B. THE SCOPE OF THE PRESENT EXERCISE

General policy

2.1 In this section we indicate the extent of the criminal law that is covered in this Bill, and our reasons for selecting that part of the law for treatment in the present exercise. We first explain the overall reach and strategy of the exercise, and then refer in more detail to two policy decisions that have caused us particular difficulty.

2.2 We have already stressed that the present Bill is intended to be complete in itself, and to be suitable for immediate enactment as a measure of law reform in its own right. In this Bill we have, therefore, included such of the general principles of the criminal law as we consider to be necessary for a proper understanding and application of the rules about offences against the person. The general principles included in the Bill, and the reasons for selecting them, are set out below, when we explain in detail the policy behind each part of the Bill. However, we can here summarise our approach as follows.

2.3 The first object of the present exercise is to provide courts trying cases of non-fatal offences against the person with a rational guide to the main issues of law that they are likely to have to decide. That means that the project should cover not only the definitions of the offences involved, but also the major defences, and some other issues of general principle that commonly arise in offences against the person cases.

2.4 Second, however, we have had to decide whether the rules of law set out in Part II of the Bill should apply only in respect of the offences against the person created by Part I of the Bill, or should apply throughout the criminal law. In each case we have concluded that it is right, and indeed necessary, that the law set out in Part II should apply generally. That law (for instance, as to duress, or as to supervening fault) is expressed in terms that are broadly, but only broadly, the same as the law that can be deduced from the rules presently governing those topics. A court might well find itself trying a case in which, for instance, a defence of duress was raised in relation both to an offence in Part I of our Bill and to another offence not dealt with in the Bill. If the Part II provisions are not applied generally, a court in such a case might find itself having to apply the statutory law of duress to one count, and then having to decide to what extent the common law of duress, to be applied to the other counts, differed from the law stated in Part II of our Bill.

2.5 However, although we have been strongly influenced towards the view that the rules in Part II should apply to all offences by the considerations just mentioned of the ease of administration of the law, that is not the only, or even the main, reason for our proposing this part of the legislation. In our view, the administration of the criminal law generally will be made materially easier and simpler by the restatement of general defences in clear and consistent terms. That is what we have sought to achieve for the defences included in this Bill.

2.6 Although we describe this process as one of "restatement", it involves not merely reproduction of the present common law but, where necessary, its clarification and the rationalisation of difficulties. That is particularly so of the treatment of the use of force in public and private defence in clause 28 of the Bill, which is discussed in paragraph 20 below. And, in one respect, our treatment of defences in the Bill goes beyond restatement. The law of duress, in relation to the crime of murder, is difficult and controversial, and has been recognised as suitable for reconsideration of the type that this Commission and the legislature, but not the courts, can best undertake.[4] We have therefore dealt with that matter, and make a provisional recommendation upon it, in paragraphs 18.14 to 18.21 below. We invite comment on whether those recommendations should be followed and, if not, as to how the matter should be dealt with. It is a matter of legislative policy whether our proposal as to the scope of the duress defences is eventually adopted. Failure to adopt that proposal would not have any effect on the viability of any other part of the Bill.

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[4] See the remarks of Lord Bridge in *Howe* [1987] AC 417 at pp. 437–438; and also Lord Brandon at p. 438 and Lord Mackay at p. 455.

2.7 By contrast, we have limited the application of some important provisions, most notably the definition of fault terms, to the offences set out in the Bill. The Commission considers that the definitions of fault terms adopted in the Bill are the most accurate and useful definitions of those terms not merely for the specific offences dealt with in the Bill, but for the criminal law generally. Since, however, the offences created by the Bill are limited to offences against the person, it would not be appropriate to use the Bill as a vehicle for extending the definitions that it provides to other offences. So to do would be at least potentially to alter the definitions of those other offences without a full consideration of the implications of that step.

2.8 For those reasons, therefore, although the definitions of fault terms adopted in the Bill are based on those proposed, in the Draft Code, as suitable for use throughout the criminal law, they are at present intended to apply only to offences against the person. If, as the Commission expects, those definitions prove acceptable in that context, there will be strong arguments, in terms of consistency, to support their adoption in legislation relating to other offences. That step must however await such further legislation; which, we hope, can be undertaken with the benefit of experience gained in the present exercise.

2.9 We do not expect this limitation of the application of fault terms to cause significant difficulty in practice. It should be noted, however, that under the present law the definitions of "recklessness" in respect of offences against the person and in respect of offences against property are different, and that difference (which we do not believe to cause practical problems) will remain even after the enactment of the Bill. That is because, putting the matter shortly, this Bill incorporates the "subjective" approach to recklessness that has long been considered to be appropriate in the law of offences against the person.[5] It leaves untouched the "objective" approach of the present law of offences against property.

Homicide

2.10 We have also given careful consideration to whether the present Bill should extend to homicide as well as to non-fatal offences against the person. There are many aspects of the law of homicide that require attention from the point of view of law reform; and undoubted arguments for saying that as a matter of practicality the same definition of fault terms, and in particular the same definition of "intention", should operate in murder and in non-fatal offences. To take a perhaps rare practical example, but one that would cause undoubted difficulty were it to arise, a court trying an indictment with separate counts of murder and of causing serious injury should not have to direct the jury differently as to the meaning of intention to be applied in adjudicating upon the different counts.

2.11 We have however concluded that the more prudent course, at this stage of the process of implementing the Code approach and principles, is to confine the present exercise to the already substantial task of reforming the law of non-fatal offences and putting into statutory form a significant proportion of the "general part". That is because the addition to these tasks of a review of the law of homicide would involve a considerable extension of the necessary process of consultation and debate, that might delay our objective of early statutory implementation of Code principles.

2.12 We say that for the following reasons. The law of murder has recently been reviewed by a Select Committee of the House of Lords,[6] the Nathan Committee, which concluded that the law should be recast broadly in the terms recommended by the CLRC in its report of 1980.[7] However, there has been no indication of support by government for putting the law of murder on that, or any other, statutory basis.[8] We see great force in the

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[5] See paragraphs 7.22–7.24 below.

[6] Report of the Select Committee on Murder and Life Imprisonment (Chairman, the Rt. Hon Lord Nathan), HL Paper 78–I, July 1989.

[7] CLRC Fourteenth Report, *Offences against the Person*, Cmnd. 7844.

[8] See the observations of Earl Ferrers, *Hansard* (Lords) vol. 512 col. 452 (30 November 1989).

Nathan Committee's proposals, which included the adoption for the law of murder of the definition of intention set out in the Commission's Draft Code, but in the absence of any support for the implementation of those proposals we see little point in reiterating them as part of this exercise. We hope that those proposals may more immediately demonstrate their value once the merits of codification have been subjected to scrutiny in the more limited area represented by the present Bill.

2.13 There is also a major, and difficult, policy question awaiting determination in the law of manslaughter, namely whether and in what terms there should be a crime of "gross negligence" manslaughter. The CLRC recommended the abolition of this crime, which punished killing with a high degree of negligence with regard to the causing of death or serious injury.[9] The CLRC thought that that crime, as then defined, might be committed by someone who was merely extremely foolish; and that that should not be sufficient to convict of manslaughter in the absence of actual advertence to the risk of death or serious injury.[10] However, since the CLRC reported in 1980 a number of serious accidents on various forms of public transport, involving numerous deaths, have reawakened public interest in the possibility of charging with manslaughter (and not just with some regulatory offence) operators of such services whose gross carelessness or inattention to the safety of their passengers[11] causes loss of life. This possibility is closely connected with consideration of whether corporate bodies, and not merely individuals, can be convicted of this type of manslaughter.[12]

2.14 It is clear that to include in the present exercise the many issues arising from gross negligence manslaughter would require very extensive consultation, on matters that have not previously been the subject of consideration by the Commission. Such an exercise would seriously delay the present Bill, which deals with areas of the law that are in urgent need of reform, and which can be perfectly coherently dealt with independently of the law of manslaughter.

Intoxication

2.15 We would ideally have wished to include in the Bill a statement of the law that we could recommend as to the effect on criminal liability of the intoxication of the accused, since such issues very frequently arise in connection with offences against the person. However, the Draft Code provisions as to intoxication, set out in clause 22 thereof, seek broadly to reproduce the common law; and further study of the present law since the Code was published has led us to doubt whether we can properly recommend the adoption of that law without further consideration of whether that law should be reformed. That consideration would cause unwarranted delay if it took place as part of the present exercise. The Commission has therefore instituted a full review of the law as to the effect of intoxication on criminal liability, in order to formulate proposals for the future law on the subject. It is accordingly not possible to formulate proposals for the reform of that law in the present Bill.

2.16 The decision that the law of intoxication required further study however raises questions in relation to the treatment of intoxication in the present Bill. At the moment, intoxication is almost entirely a matter of common law. Its two most important effects upon criminal liability are (very broadly stated) that, first, where recklessness on the

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[9] The law, never easy to formulate with certainty, is to be found in *Bateman* (1925) 19 Cr App R 8 and *Andrews* v *DPP* [1937] AC 576.

[10] CLRC, Fourteenth Report, para. 121.

[11] If such a person was actually aware that his conduct was exposing the passengers to the risk of serious injury, he would be guilty under a limited form of manslaughter that the CLRC recommended, and that we embodied in clause 55(c)(ii) of the Draft Code. The further concern is with cases where it is alleged that, although the operator was not aware of the risk, he ought to have been so aware and thus ought to have taken precautions against that risk.

[12] See in particular *R* v *HM Coroner for East Kent ex p. Spooner* (1987) 88 Cr App R 10, in which the court left open the possibility, previously doubted in *R* v *Cory Bros* [1927] 1 KB 810, that a corporate body can be indicted for manslaughter. In *P & O European Ferries (Dover) Limited* (1990) 93 Cr App R 72 (the "Zeebrugge" case) Turner J held that an indictment for manslaughter could lie against a corporation. The prosecution failed on the facts.

accused's part has to be established, a person who was voluntarily intoxicated will be treated as having been aware of a risk of which he would have been aware had he not been intoxicated; and, second, where a defence is based upon a belief held by the accused, a person who was voluntarily intoxicated will be treated as not having held a belief that he would not have held had he not been intoxicated. It will be seen that these two rules have important implications for many of the matters dealt with in this Bill. Thus, recklessness forms part of the definition of many of the offences created by Part I of the Bill, and a definition of the term, as used in those offences, is provided by clause 2 of the Bill; and belief on the part of the accused is a possible element in all three of the general defences created by clauses 26–28 of the Bill.

2.17 In respect of these matters, our intention is that the Bill should be read subject to the present law of intoxication, pending our full review of the latter topic. In that review we will make recommendations about, and Parliament will thus have an opportunity to consider, what part should properly be played by intoxication in the definition of criminal liability. The law determined by Parliament, if it differs from the present law as to the effect of intoxication, will then abrogate the provisions as to intoxication contained in the present Bill or in any legislation on the lines of the Bill.

2.18 That, in its turn, has two implications. First, the present Bill, and consideration of the policy issues that it raises, does not need to await action in respect of the law of intoxication. The Bill is self-contained in the sense that it can be enacted in advance of any decision about intoxication. Second, however, it is important that it should be clear beyond dispute that the law as stated in the Bill is subject to the existing rules on intoxication. It might be argued that that could be achieved without specific reference to intoxication in the Bill, the rules on intoxication being amongst the rules of the common law to which, by clause 1(3), the provisions of the Bill are subject. However, we have to bear in mind that in the Bill, recklessness, and the defences to which we have referred above, are for the first time subject to express common law definition; and there is a substantial danger that those definitions, if not expressly qualified in the case of the intoxicated defendant, might be thought to prevail over the common law definitions of the same subject-matter: those common law definitions having been qualified in cases of intoxication in the manner described above.[13]

2.19 Accordingly, we have concluded that specific provision should be made to reproduce in this Bill the common law on intoxication, insofar as it affects matters dealt with in the Bill. The relevant provisions will be found in clauses 1(5), 23(3) and 29, and since there are various considerations common to all the provisions they are explained together, in some detail, in section H of Part III of this Consultation Paper. Those clauses seek to apply the common law on intoxication, with some very minor adjustments. The formulation of the clauses draws heavily on the clause on intoxication, clause 22, of the Draft Code. It must be reiterated, however, that the clauses by no means necessarily represent the Commission's view of what the criminal law should ideally say in respect of intoxication and, in the event of any proposals for the reform of the present law on intoxication finding acceptance, those clauses will have to be replaced. As we explained in the Code Report,[14] restatement of the present law in accurate statutory form produces a somewhat complex formulation; that such complex statement is necessary, and that the complexity has to be explained to juries and be applied by those juries, has reinforced our opinion that the present law is in need of critical reassessment.

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[13] In our report on *Offences Relating to Public Order* (Law Com. No. 123, 1983) we drew attention, at paragraph 3.53, to a somewhat similar danger that might arise if a statutory offence expressed in terms of "awareness" were not expressly qualified by rules as to the effect of intoxication as that is understood in the common law. Parliament accepted that view when it provided, in section 6(5) of the Public Order Act 1986, that where awareness of stated circumstances had been made an element of offences under the Act, "a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated."

[14] Code Report, paragraph 8.33.

C. THE BILL AND THE EXISTING LAW

3.1 Part I of the Bill deals, as comprehensively as possible, with non-fatal offences against the person. Part II of the Bill codifies, *for the criminal law as a whole*, various defences and other elements of the "general part". The Bill draws heavily upon the terms of, and the approach and principles adopted in, the Draft Code. The remainder of this Consultation Paper is devoted to an extended explanation of and commentary upon the terms of the Bill.

3.2 In recommending the terms of the present Bill we have been concerned, as we were in drawing up the Draft Code, to ensure that the law set out in the Bill does effectively replace the common law and existing statutory provisions in relation to those matters with which it deals; but that, at the same time, valuable parts of the common law that are intended to be retained, at least for the moment, are indeed kept in being.

3.3 Because the present Bill has a limited subject-matter, and does not purport to be a complete codification, the first of these objectives can be achieved by a simple process of repeal or amendment of statutory provisions inconsistent with the Bill's provisions; the abolition of the common law offences that the offences created by Part I of the Bill replace; and the abrogation of the rules of the common law that at the moment govern the defences and other general matters dealt with in clauses 23–28 of Part II of the Bill. These steps are taken in clause 31 of the Bill.

3.4 Second, in the Code Report we thought it important to make clear that although it is now recognised that the courts do not have power to create new *offences*,[15] it is desirable that the courts should be free to develop new *defences* to criminal liability, either to recognise the demands of changing circumstances or to piece out unjustified gaps in the existing defences. It was in order to leave the courts free to achieve those objectives, as well as to ensure that existing defences not specifically dealt with in the Draft Code remained in existence, that we included clauses 4(4) and 45 in the Draft Code.[16] The present Bill, however, does not purport to be a complete statement of the criminal law, or even of the defences to criminal liability provided by that law, and thus does not pose what we perceived to be the potential problem of the Draft Code, of appearing to exclude, by substitution by positive legislation, the existing common law. The present Bill clearly and on its face deals with the subject-matter as to which it makes specific provision, and in respect of which the common law is expressly abrogated by clause 31. All other areas of the common law remain untouched.

3.5 Nevertheless, we think that it will be helpful to users of the Bill if that aspect of its operation is made more explicit than, strictly speaking, is necessary. Clause 1(3) of the Bill, in addition to negativing any implication in clause 1(2) that Part I is subject only to Part II, reminds readers that;

> The application of the defences and rules of law contained in Part II does not exclude the application of other defences under or rules of the common law.

3.6 For somewhat similar reasons, clause 1(3)(b) provides that the offences contained in the Bill are also subject to any enactment or rule of the common law providing or allowing a justification or excuse for any act or omission; and it is provided by clause 1(6) that "justification" includes authority.

3.7 So far as lawful authority is concerned, the Code team suggested that a general statement should be included in the Code to the effect that it is not criminal to do an act that is authorised by law.[17] They considered such a rule to be "uncontroversial, indeed largely self-evident".[18] We agree with that latter view, to the extent that we did not think it

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[15] *Knuller* v *DPP* [1973] AC 435; see Code Report, paragraphs 2.11 and 2.19.

[16] For further explanation, see paragraphs 12.38–12.41 of the Code Report.

[17] Law Com. No. 143, paragraphs 13.58–13.63 and draft Bill, clause 48.

[18] *Ibid.*, paragraph 13.60.

necessary to include any such provision in the Draft Code. However, having reconsidered the matter, we think that it might cause unnecessary uncertainty if our new statutory provisions, by making no reference to any exculpation provided by lawful authority, could be read as excluding any such considerations from the rules determining an accused's criminal liability. The Code team's account showed, however, that such savings are difficult to list in any definitive form, and may be subject to some degree of judicial judgement. The same is true, perhaps to an even greater degree, of defences or exemptions from the provisions of criminal statutes that may be described as matters of excuse rather than of authority. Clause 1(3)(b) therefore in effect retains the present power of the judiciary to recognise circumstances of excuse; and what is perhaps an obligation on the part of the judges to recognise that, where a specific act is authorised, or required, either by statute or by common law,[19] a general criminal prohibition, even in a subsequent statute, will be read as subject to that saving.

3.8 We recognise that this approach leaves open a degree of judicial judgement, but that would appear to be a valuable feature of the present law, and one not therefore to be removed in this Bill, and particularly one not to be removed for want of specific saving. However, we specifically invite comment on this issue, and in particular on whether we have correctly assessed the impact of the present law, and adequately conveyed that impact in the Bill.

3.9 In four clauses of the Bill, and notwithstanding clause 1(3)(b), specific reference is made to justification, authority, or excuse.[20] We explain that aspect of those clauses briefly here.

3.10 Clause 12 (torture) provides that the availability of authority, justification or excuse as a defence shall be judged according to the law of the place where the torture took place; this offence, unusually, being prosecutable in England wherever the conduct complained of occurs. The particular implications of this clause, appealing as it may do to defences or excuses other than those provided by the law of England and Wales, make it necessary to make specific reference to such provisions. In clause 14 (unlawful detention) it seems helpful to make specific reference to cases where detention is justified, authorised or excused by law, the most obvious example perhaps being the powers, and indeed duties, of prison officials administering sentences imposed by the courts. We are fortified in that view by the fact that the CLRC, whose proposed definition is closely followed by clause 14, recommended that the offence should specifically be one of detention without lawful excuse.[21] Clause 18 (abduction) repeats the reference to lawful authority or excuse that is found in the statute from which it is taken, section 2 of the Child Abduction Act 1984. It therefore seems prudent that clause 19 (aggravated abduction), being simply the commission of the clause 18 offence with a particular ulterior intent, should repeat the formulation of clause 18; however unlikely it is that a court could discern a reasonable excuse for the conduct referred to in clause 19.

3.11 We should also draw attention to one further specific provision of a somewhat similar nature. The common law defence of "necessity" is at present of uncertain nature and extent. It would be premature to attempt a statutory codification; so the development of the defence, for the moment at least, is left in the hands of the judges.[22] However, the relationship between this defence, so far as it exists, and other defence that is codified in the Bill, duress of circumstances, is a matter of some complexity. We seek to explain the present law on that matter, and in particular that necessity remains a separate issue from duress of circumstances, in paragraphs 19.3–19.5 below. In order to avoid any misapprehension on the part of users of the Bill that our provisions as to duress of circumstances might have taken up and overridden the law as to necessity, we insert specific guidance in

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[19] e.g. the powers of a constable: see *Johnson* v *Phillips* [1976] 1 WLR 65.

[20] For the avoidance of doubt, clause 1(4) provides that such references are not to be read as excluding the application of clause 1(3)(b) in other cases.

[21] Fourteenth Report, para. 231.

[22] See the Code Report, paragraph 12.41(ii).

clause 31(3)(b)(i). That provides, in relation to the abrogation of defences available under the common law, that the common law defences of duress by threats and duress of circumstances are abrogated, "but not any distinct defence of necessity." Necessity is thus left open for any further development that the courts may think desirable.

3.12 The above are respects in which the limited content of the Bill, when compared with that of the Draft Code, requires some alteration of the method and terms of the latter document. Generally speaking, however, the Bill follows closely the terms of the Draft Code.

PART II

NON-FATAL OFFENCES AGAINST THE PERSON

A. INTRODUCTION

4.1 At present, the most important non-fatal offences against the person are those in sections 18, 20 and 47 of the Offences against the Person Act 1861 ("the 1861 Act"). These sections deal respectively with wounding or causing grievous bodily harm with intent; maliciously wounding or inflicting grievous bodily harm; and assault occasioning actual bodily harm. With the regrettable increase in prosecutions for serious violence, these offences occupy a very considerable part of the time of the courts.[23] It is therefore important that the law governing such behaviour should be clear and well-understood, to ensure that trials of cases of violence can be conducted efficiently and justly.

4.2 Reform of the present law has already been strongly urged by the CLRC in 1980,[24] the substance of the CLRC's proposals having been adopted by us in the Draft Code. As we indicated in paragraph 1.13 of the Code Report, a special group headed by Lord Justice Lawton, who was Chairman of the CLRC at the time of its Fourteenth Report, reviewed those parts of the Draft Code that embodied the proposals made in that Report. We first however deal with the definitions of fault terms employed in the law of offences against the person, and explain the reasoning behind the definitions that are set out in the present Bill. We regard this step as of crucial importance, since unless there is agreement on the meaning of terms used in the definitions of offences some of the present uncertainty, and thus potential injustice, is in danger of being perpetuated. We then demonstrate how that terminology can be used in a new set of offences that would replace the most criticised parts of the present law; and also use that terminology to codify and express in consistent and uniform terms the remainder of the law of non-fatal offences against the person.[25]

B. FAULT TERMS

5.1 It is of the essense of the codification proposal, to which the Bill will give partial effect, that the criminal law should employ a consistent vocabulary and that the meanings of key terms should be as clear as possible. That would correct a notable weakness in English criminal law. That weakness has nowhere been more productive of difficulty and uncertainty than in the language used to express modes of fault. Clause 2 of the Bill therefore defines the terms "intention" and "recklessness", and related terms, as they are used throughout the definitions of the offences set out in Part I of the Bill. The clause gives effect to the policy of the Commission as first stated in its *Report on the Mental Element in Crime* in 1978.[26] The same policy was regarded as "essential" by the CLRC in its Fourteenth Report on *Offences against the Person*[27] and was adopted (in respect of the intention required for murder) by the Nathan Committee[28] in its Report in 1989.

5.2 Definitions of "intention" and "recklessness" were supplied in clause 18 of the Draft Code. This was done by explaining what is meant, in the context of offences, by a reference to a person's acting "recklessly" or "intentionally" with respect to a circum-

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[23] In 1988, 17,167 cases under these sections were dealt with in the Crown Court alone: *Criminal Statistics* 1988, Supplementary Tables, Vol. 2, p. 8.

[24] Fourteenth Report, paras. 149–157.

[25] That law has recently been reviewed by the House of Lords in the important cases of *R* v *Savage* and *DPP* v *Parmenter*. The cases were heard together and reported together at [1991] 3 WLR 914. The House of Lords' decision is referred to in this Consultation Paper as "*Savage*". In *Savage* the accused, in throwing a glass of beer over the complainant, also cut the latter's wrist. The jury found that (at least) the glass must have slipped from her grasp and done the damage, but without any intention on her part that that should happen. In *Parmenter* the accused caused injury to his young child, his case being that he did not realise that what he did would cause any injury. In both cases the question as to the construction of the 1861 Act was whether, on such assumed facts, the accused was guilty of an offence under section 20, or alternatively section 47.

[26] Law Com. No. 89, 1978.

[27] Paras. 6–7.

[28] Paras. 69–71. For the Nathan Committee, see paragraph 2.12, n. 6, above.

stance or a result. The method and the detailed wording took account of criticisms of earlier drafts.[29] The Code definitions are used in the present Bill, with the omission of some features not needed for the purposes of offences against the person, and subject to amendment of the definition of "intention" to correct some defects to which attention has been drawn since publication of the Code Report.[30]

5.3 Unlike the "general part" provisions to be included in the Bill, the definitions of fault terms will not be given general application throughout the criminal law. They will apply only for the interpretation of the offences against the person defined in the Bill. This means, for example, that the expression "reckless(ly)" in existing statutory offences, to which the decision in *Caldwell*[31] applies, will continue to be governed by that rule.[32]

"Intention"

5.4 Clause 2(a) provides for the purposes of the offences in Part I of the Bill that:

> "a person acts . . . 'intentionally' with respect to a result when—
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> (i) it is his purpose to cause it; or
>
> (ii) although it is not his purpose to cause that result, he is aware that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result."

5.5 It is in relation to intention that the proposal to define key words has been most controversial, not least because it involves a departure from the position recently taken, in the context of the law of homicide, by the House of Lords.[33] It is in that context that the absence of definition, whether by statute or in the practice of the courts, has been most productive of difficulty, in particular in relation to a result of conduct that, although not desired by the actor, is known by him to be the certain, or overwhelmingly likely, outcome of his actions. As the authorities stand, the jury, in a case where it appears that the defendant did not desire the relevant result of his actions, are only told that they may nevertheless *infer* his intention to cause that result if he recognised that result to be a "virtually certain" consequence of his actions.[34] This form of direction falls short of asserting that such recognition of virtual certainty is in law of case of intention; and thus does not clarify the nature of the state of mind that the jury may "infer". We criticised this position in the Code Report,[35] and that criticism was endorsed, in the context of murder, by the Nathan Committee.[36] We are clear that equally in any legislation for non-fatal offences these difficulties must be disposed of by a statutory definition of intention.

5.6 In most cases courts will be concerned only with paragraph (i) of the proposed definition: it is usually appropriate to describe a person as intending a result of his actions only if it is his purpose to bring that result about. Reference to paragraph (ii) will rarely be necessary. That sub-paragraph is needed, however, because "intention" requires in the criminal law a meaning slightly extended beyond its primary meaning of "purpose". A person must sometimes be treated as intending a result of his actions although he does not act in order to cause it, or act with the "purpose" or "desire" of causing it. As Lord Hailsham of St. Marylebone expressed it in *Hyam*,[37] a person must be treated as intending

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[29] See Code Report, paras. 8.6, 8.10, 8.12; also Law Com. No. 143, para. 8.18.

[30] See para. 5.9, below.

[31] [1982] AC 341.

[32] Under the interpretation of "reckless" in *Caldwell*, a person is reckless whether a result will occur "if (1) he does an act which in fact creates an obvious risk that [the result will occur] and (2) when he does this act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it." ([1982] AC 341, 354 per Lord Diplock.)

[33] *Moloney* [1985] AC 905; *Hancock and Shankland* [1986] AC 455.

[34] *Nedrick* [1986] 1 WLR 1025 at p. 1028.

[35] Para. 8.16.

[36] Nathan Committee Report, para. 69.

[37] [1975] AC 55 at p. 74.

"the means as well as the end and the inseparable consequences of the end as well as the means." If he acts in order to achieve a particular purpose, knowing that that cannot be done without causing another result, he must be held to intend to cause that other result. The other result may be a *pre-condition:* as where D, in order to injure P, throws a brick through a window behind which he knows P to be standing; or it may be a *necessary concomitant* of the first result: as where (to use a much-quoted example) D blows up an aeroplane in flight in order to recover on the insurance covering the cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends the crew to be killed.

5.7 There is, of course, no absolute certainty in human affairs. D's purpose *might* be achieved without causing the second result; P *might* fling up the window while the brick is in flight; the crew *might* make a miraculous escape by parachute. These, however, are only remote possibilities, as D (if he contemplates them at all) must know. The result will occur, and D knows that it will occur, "in the ordinary course of events." This expression was used in the Draft Code clause 18 to express the near-inevitability, as appreciated by the actor, of the secondary result.

5.8 It is desirable to stress, because the point has been misunderstood in some quarters, that this way of defining "intention" does not have the effect of treating some cases of recklessness as cases of intention by extending liability for an offence requiring intention to every case where the actor foresees the relevant result as highly likely to occur. On the contrary, the definition extends the meaning of "intention" only very slightly beyond the primary meaning adopted in clause 2(a)(i) of "purpose". The point of the phrase "in the ordinary course of events," as commentary on the definition made clear, was to ensure that "intention" covered the case of a person who knows that the achievement of his purpose will necessarily cause the result in question in the absence of some wholly improbable supervening event.[38] The phrase had earlier been used by the CLRC in explaning their use of the word "intention" in the context of offences against the person.[39] The Nathan Committee recommended adoption of the Draft Code definition for the purpose of the law of murder.[40] The Lord Chief Justice expressed approval of it in a House of Lords debate on that committee's report.[41] It would seem that this aspect of the definition can now be presented afresh with some confidence.

5.9 However, the definition in clause 2(a) of the present Bill, while implementing this approach of the Draft Code, differs in two respects from the detailed wording of the Code. Since publication of the Code Report Professor J. C. Smith, who was chairman of the Code team, has pointed to two possible defects in the Draft Code definition.[42] That definition, as put forward in clause 18(b)(ii) of the Draft Code, read (in the relevant part):

> "a person acts . . . 'intentionally' with respect to . . . a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events."

The first suggested defect may be thought to be of some concern. The definition treats a person as intending a secondary, perhaps undesired, result of his act if, but only if, he knows that that result is virtually bound to occur. But that formulation does not cater for the case in which the actor is not sure that his main purpose will be achieved—he cannot be *sure*, for example, that the bomb that he places on the plane will go off. In such a case he does not know that the secondary result (the death of the crew) will occur. Yet he ought to be guilty of murder if the crew do die because he knows that they *will* die *if* the bomb goes

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[38] Compare Lord Bridge's reference in *Moloney* [1985] AC 905 at p.929, to "the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it."

[39] Fourteenth Report, para. 10.

[40] Report, para. 71.

[41] H.L. Debates, vol. 512, col. 480.

[42] "A Note on 'Intention'" [1990] Crim LR 85.

off. So the definition of "intention" should treat a person as intending a result that he knows to be, in the ordinary course of events, a necessary concomitant of achieving his purpose.

5.10 Professor Smith suggests, secondly, that so providing would also make clear "that a result which it is the actor's purpose to avoid cannot be intended,"[43] an example would be where a man tries to save a baby's life by escaping from a burning building across a dangerous beam, knowing, however, that it is virtually certain that both will fall and be killed. That such a case is excluded is not wholly clear in the Code draft, which is perhaps defective on that ground also.

5.11 The definition of "intention" employed in clause 2(a) of the present Bill takes account of both the above points. It makes plain that the definition is not confined to cases where the actor is certain that he will succeed in his principal objective. However, it treats as intended any result that the actor recognises at the time that he acts as inevitable if his purpose is to be achieved; and he is treated thereafter as having intended that result whether or not that purpose is in fact achieved.

"Recklessness"

5.12 The Bill employs the definition of "recklessness" proposed in clause 18(c) of the Draft Code. This provides that:

"a person acts . . . 'recklessly' with respect to—

(i) a circumstance when he is aware of a risk that it exists or will exist;

(ii) a result when he is aware of a risk that it will occur;

and it is, in the circumstances known to him, unreasonable to take the risk."

5.13 This was the use which we proposed for "reckless" and related words in our earlier *Report on the Mental Element in Crime*, with the subsequent support of the CLRC.[44] The definition restates existing law in respect of the offences with which the Bill deals, because non-fatal offences against the person at common law, and statutory offences against the person employing the fault term "maliciously," are interpreted as requiring that the actor knowingly take the risk of the occurrence of the relevant type of harm.[45] In this respect, as generally, the Bill gives effect to recommendations of the CLRC.

Other fault terms

5.14 In a number of places the Bill uses the terms knowledge and awareness, which are not defined.

5.15 In clause 18(a) of the Draft Code we put forward a definition of acting "knowingly" with respect to a circumstance, which definition covered not only the case when the actor is aware that the circumstance exists but also the case when he avoids taking steps that might confirm a belief that that circumstance exists. We considered that the last element of the definition was necessary to capture the concept of "wilful blindness" which, we suggested, was commonly treated as an aspect of "knowledge" in English criminal law.[46] It is right to say that we are no longer sure that the latter suggestion was correct, in that wilful blindness appears more commonly to appear as an *alternative* to

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[43] *Ibid.*, p.88.

[44] Fourteenth Report, paras. 11 and 12.

[45] See further on this point, paragraphs 7.22–7.23 below.

[46] Code Report, paragraph 8.10

knowledge in considering whether an element of *mens rea* should be supplied in relation to statutory offences that are, on their face, offences of strict liability.[47] However, for the purposes of the present exercise it is not necessary to resolve this issue, since within this exercise we simply have to consider whether there are uses of "knowledge" within the Bill that require definition if they are to be correctly interpreted. As at present advised, we are satisfied that there is no place in the Bill where "knowing", or any cognate word, need to be interpreted other than in their ordinary meaning of actual knowledge. Briefly to summarise, knowledge is usually used in the Bill either in relation to *future* events,[48] where the concept of wilful blindness is simply inept; or as an alternative to belief[49] or recklessness,[50] where it is well established, and in any event it would seem to us to be a matter of common sense, that there is no room or justification for construing knowledge to include wilful blindness.[51] In the one other case of knowledge, in clause 7, we would expect "knowing" to be understood as referring to actual knowledge.

5.16 So far as "aware" is concerned, there is no reason to think that as used in this Bill the word will be construed in anything other than its ordinary and natural meaning, as indicating, on the part of the person described as being so aware, a subjective realisation of the state of affairs referred to.

C. OFFENCES COMMITTED BY OMISSION

Background

6.1 The question of whether and to what extent criminal liability should be imposed for an omission to act has long been recognised as difficult and controversial. Recent exchanges between two of the country's leading criminal law scholars[52] suggest that a generally agreed view as to policy on this subject for the criminal law as a whole is still very far away. Against this background of difficulty and disagreement, we are clear that, particularly in view of the limited nature of the present exercise, we need to proceed with circumspection. That was, rightly, the approach of the CLRC in its Fourteenth Report; and, indeed, the approach that we ourselves took in the Draft Code.

6.2 The CLRC[53] discussed at some length whether it should remain possible to commit any offences against the person by mere omission, bearing in mind that under the present law liability for omission can arise on a charge of murder, manslaughter, wounding, causing grievous bodily harm or false imprisonment. They concluded that, whilst it should remain possible to commit some crimes by omission, it was desirable to limit such liability to the more serious offences, including homicide, causing serious injury, kidnapping and abduction; since, without such a limitation, comparatively trivial failures of duty, or failures with comparatively trivial results, would become criminal. The CLRC also recommended that no attempt should be made to codify in legislation the circumstances that give rise to such a duty: that should continue to be determined by the existing rules of the common law.[54]

6.3 The Code team were faced with what we have already indicated is the extremely difficult and controversial problem of producing a *general* rule for liability for omissions, applicable throughout the criminal law as a whole. They determined, as set out in clause

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[47] See e.g. Lord Hewart CJ in *Evans* v *Dell* (1937) 53 Times LR 301 at p. 313; Devlin J in *Roper* v *Taylors Central Garages* [1951] 2 TLR 284 at p. 287; Parker J in *James & Son Ltd.* v *Smee* [1955] 1 QB 78 at p. 91; Lord Reid in *Warner* v *Metropolitan Police Commissioner* [1969] 2 AC 256 at p. 279.

[48] See clauses 26(4); 27(3)(c); and 28(7).

[49] See clauses 26(2)(a); 27(2)(a); and 27(3)(a).

[50] Clause 9.

[51] *Griffiths* (1975) 60 Cr App R 14; *Smith (Albert)* (1977) 64 Cr App R 217.

[52] Professor Andrew Ashworth, "The Scope of Criminal Liability for Omissions", (1989) 105 LQR 424; Professor Glanville Williams, "Criminal Omissions—the Conventional View", (1991) 107 LQR 86.

[53] Fourteenth Report, para. 35.

[54] *Ibid.*, paras. 252–255.

20 of the Bill annexed to the Code team report,[55] that offences should not be committable by omission unless the enactment creating them specifically so provided; and that, within offences against the person, such provisions should be made in respect of the offences identified by the CLRC, as indicated in paragraph 6.2 above. However, in relation to the circumstances in which a duty to act (and therefore the possibility of liability by omission) should arise, the Code team, pursuing their mission of codification, considered that it would not be satisfactory simply to refer to the common law as the source of the duty to act.[56] The team believed that it was possible to state those established common law principles in a form suitable for codification, and in clause 20(2) of their Bill they produced a fairly elaborate rationalisation and generalisation of the common law as referred to by the CLRC.[57]

6.4 The scrutiny team that considered on our behalf that part of the Code team's report expressed doubts about the accuracy of the formulation in the Code team's Bill, though without finding it possible to put any improved version before us. That exercise suggested that it might be better to revert to the CLRC's view, that codification of the existing duties relevant to criminal liability was neither necessary nor advisable.

6.5 The first part of the Code team's recommendation, that there should be a *general* rule that liability for omissions should only attach where there was a specific statutory provision to that effect, was also criticised, in this case in a powerful article by Professor Glanville Williams.[58] Those criticisms led us, as we explained in paragraph 7.10 of the Code Report, to conclude that there should be no express provision at all in the Draft Code as to the circumstances in which liability should attach for omissions, that task in effect being left to judicial construction. It appears[59] that we may have misunderstood Professor Williams' position on the general question referred to above, since he would wish severely to limit the cases in which liability can be imposed for omissions, and thus would not allow latitude for judicial extension of such cases without specific Parliamentary approval.[60] This question of the form in which a *complete* Code should make provision for liability for omissions is clearly both important and interesting, as well as being one of considerable difficulty. It would in our view be a mistake to attempt to resolve it in the course of the present exercise, since we are here concerned only with which, if any, of the particular offences created by the present Bill should be subject to liability by omission to act.

6.6 In the Draft Code, as we have said, we made no specific provision as to liability for omissions. We also recognised that, under the Draft Code, identification of the situations in which a relevant duty to act exists would remain a matter of common law.[61] In the present exercise, however, it is appropriate, and indeed necessary, that we should review both those decisions insofar as they affect the offences dealt with in the present Bill.

Offences subject to liability by omission

6.7 As we have indicated above, this question was considered with some care by the CLRC, who considered that, in the interests of avoiding the imposition of criminal liability in trivial or borderline cases, liability for omission should only extend to serious crimes. We are, as at present advised, minded to agree with that view. It means that, before a crime can be committed by omission, the prosecution will have to prove that the accused, by failing to perform a given duty, caused an outcome of some seriousness, and did so with a significantly culpable state of mind.

6.8 In the present Bill, therefore, we apply the approach of the CLRC that we summarised in paragraph 6.2 above. Clause 3 of the Bill explains how liability for an

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[55] Law Com. No. 143, p. 182.

[56] Law Com. No. 143, paras. 7.11–7.12.

[57] *Ibid.*, pp. 182–183.

[58] (1987) 7 Legal Studies 92.

[59] See (1991) 107 LQR, especially at pp. 96–97.

[60] See further on this point the exchanges referred to in n. 52 above.

[61] Code Report, para. 7.12.

omission will operate in respect of any specific offence. That liability is then, in accordance with the CLRC's recommendations, extended by the specific clauses in question to the offences under clause 4 (intentional serious injury); clause 12 (torture); clause 14 (unlawful detention); clause 15 (kidnapping); clause 17 (abduction); and clause 19 (aggravated abduction). In the case of torture, as we indicated in the Code Report,[62] specific reference to omission is required in order to ensure that we fulfil the United Kingdom's international obligations. The detention and abduction offences in this Bill are in effect the offences recommended by, and in the terms recommended by, the CLRC;[63] but the general policy that we adopted for the Draft Code, as explained in paragraphs 6.5–6.6 above, precluded us from explicitly implementing in the Draft Code that part of the CLRC's recommendations that made those offences committable by omission.[64] In this Bill, with its different circumstances, we are able to make that provision; and we consider that in the interests of clarity and certainty it is desirable that the policy adopted should be thus specifically expressed.

6.9 We invite comment on this decision to make express provision for liability for omissions; and, in particular, on the range of offences selected as subject to liability by omission, including comment on whether such liability should be extended to any other of the Bill offences.

Duties to act

6.10 As mentioned in paragraph 6.6 above, we took the view in the Draft Code that the cases in which a duty to act was recognised should be, and should be limited to, those recognised at common law. Those duties were listed by the CLRC in paragraph 252 of its Fourteenth Report, and include the duty of a parent to his young children; of members of a household who assume the care of a fellow member who becomes infirm or helpless;[65] and of a police officer not deliberately to neglect his duty to enforce the law.[66]

6.11 We have now reconsidered two questions: whether there should be a statutory rationalisation and restatement of the duties, along the lines suggested by the Code team;[67] and whether, even if the law is not codified in that respect, there should be added to our previous reliance on duties created at common law a specific reference to duties created by statute.

6.12 So far as the first question is concerned, we continue to find persuasive the arguments that were pressed on us in the course of the Code exercise.[68] We would add to those arguments the consideration that, even if it were thought desirable to reconsider the possibility and desirability of formulating a general rule as to liability for omissions, it would not be appropriate to address that general question in the context of an exercise like the present, that is limited to offences against the person. Such a step may or may not appear appropriate, and prove possible, when something more resembling a general Code passes into legislation: that, of course, having been the context in which the Code team were working.

6.13 So far as the second question is concerned, it will be noted that clause 3 of the present Bill, following our decision in respect of the Draft Code,[69] is limited to acts "that [the accused] is under a duty to do at common law". That, however, is only a provisional conclusion on or part, since we appreciate both that there may be duties, not so far recognised by the common law, that it may be wished to specify now as suitable to ground

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62 Para. 14.40.
63 See paragraph 12.9 below.
64 Code Report, para. 14.50.
65 *Stone and Dobinson* [1977] QB 354.
66 *Dytham* [1979] QB 722.
67 See paragraph 6.3 above.
68 See paragraphs 6.4 and 6.6 above.
69 Code Report para. 7.12, and paragraph 6.6 above.

criminal liability; and that there may be existing duties, created not by common law but by statute, that should similarly ground criminal liability.

6.14 We ask for comment on both of those issues, and generally on whether a simple statement relying on the common law is sufficient for present purposes. It may, however, be helpful if, without in any way limiting consultees, we make some observations on the points raised in paragraph 6.13.

6.15 First, as to the identification of further duties, the list of common law duties set out in paragraph 6.10 above is already substantial, and the common law referred to in clause 3 is susceptible of extension by the same process of judicial activity as created it in the first place. In that process, however, we would expect the judges to have in mind that they are dealing with criminal liability, and that it is therefore necessary to proceed with caution. We think that the same cautious approach is appropriate to the process of legislation, particularly if (as we are at present minded to think) liability for omission should only apply to serious offences.[70] Nonetheless, we do ask for comment on whether there is any duty that should be specified in the Bill as an addition to the common law duties to which clause 3 of the Bill is at present limited.

6.16 We similarly wish to consider further whether there should be any general reference in the Bill to duties created by statute as well as by common law. We have not found this an easy question, but our reasons for, provisionally, adopting in clause 3 of the Bill the limitation adopted by the CLRC[71] are as follows.

6.17 Whilst there are many statutory provisions that can be described, in general terms, as dealing with the obligations of a class of persons towards their fellow citizens, it does not necessarily follow that those statutory provisions create a "duty" of the same type as those discussed above. To take two examples, section 1 of the Children and Young Persons Act 1933 creates an offence of, inter alia, wilful neglect of a child or young person under the accused's charge; and section 127 of the Mental Health Act 1983 creates an offence of neglecting patients who are under the accused's charge. These provisions certainly place obligations on the persons subject to them. However, it is less clear that the obligation thereby created is a general duty, similar to those at common law, that in itself can ground liability for the serious offences dealt with in the present Bill; as opposed to being the obligation not to commit the limited and specific statutory offences created by the provisions referred to above.

6.18 This difficult issue has, perhaps, never previously been thoroughly analysed because in the case of those "statutory" obligations where one instinctively thinks that liability for serious offences should be possible if the performance of the obligation is culpably omitted, that step has often already been taken by the common law. Thus, in the two cases mentioned in paragraph 6.17 above, the persons subject to the statutory obligations are almost certainly subject also to the common law duties binding those who are obliged to care for, or undertake the care of, children and vulnerable persons.[72] But if the law were to go further, and seek to create a duty founding liability for serious offences in every case where a statute appeared to create or assume a duty towards others, that might very considerably widen this branch of the law.

6.19 This point can be further illustrated by referring to some of the many statutory provisions that, unlike those referred to in paragraph 6.17 above, are expressly formulated in terms of "duty": examples are the duties of employers, manufacturers and employees created by sections 2–7 of the Health and Safety At Work Act 1974; and the duty of an owner of a ship to ensure that it is operated in a safe manner, created by section 31(1) of the Merchant Shipping Act 1988. The breach of such statutory duties is, however, specifically punished by offences that are created by those same statutes: in the case of Health and

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[70] See paragraphs 6.7–6.9 above.

[71] Fourteenth Report, para. 256(b).

[72] See paragraph 6.10 above.

Safety by the offence of failing to discharge a duty under sections 2–7 that is created by section 33(1)(a) of the 1974 Act, and in the case of merchant shipping by the offence of failing to discharge the section 31(1) duty that is created by section 31(3) of the 1988 Act. Here again, there would seem to be serious objections to treating breach of these duties as the ground for offences of omission under the present Bill when Parliament in creating the duty has provided a specific and limited sanction for its breach: yet that would seem to be what would follow from basing liability for omission on breaches not only of common law but also of (any) statutory duty.

6.20 We have indicated that we do not find these issues easy. We therefore invite comment as to whether, in addition to the provision in clause 3 of the Bill relating to duties at common law, there should be a reference to duties created by statute. If it is thought desirable that there should be such reference, should the reference be to statutory duties generally, or should there be reference to specific statutes? And, in the latter case, are there any specific statutory provisions to which consultees would wish to draw our attention as particularly requiring this treatment?

D. GRIEVOUS BODILY HARM, WOUNDING AND ACTUAL BODILY HARM

Introduction

7.1 We explained in paragraph 4.2 above that the law contained in the 1861 Act, relating to non-fatal violence to the person, has been the subject of recurrent criticism in recent years. The relevant sections of the 1861 Act read as follows:

Section 18:

> "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person with intent to do some grievous bodily harm to any person or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of life imprisonment]."

Section 20:

> "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of [an offence], . . . and shall be liable . . . [to a maximum penalty of 5 years' imprisonment]."

Section 47:

> "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . [to a maximum penalty of 5 years' imprisonment]."

7.2 Criticism of these provisions has taken two forms, both of which were voiced by the CLRC in its Fourteenth Report in 1980.[73]. First, the statute is expressed in complicated, obscure and old-fashioned language, which needs almost complete translation before these offences can be applied by a court or jury; and the structure of the three sections is complicated and technical. The law is thus difficult to use; productive of mistakes and misunderstandings by lawyers; and virtually incomprehensible to laymen. On those grounds alone there would be an overwhelming case for its replacement by a code written in simple, modern language. Second, however, even when the lawyers have translated the 1861 Act into modern language, the law that that Act lays down is irrational, unjust, and an ineffective instrument for the important task of punishing and deterring violent conduct. The need is, therefore, not merely for a restatement of the law in modern

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[73] CLRC, Fourteenth Report, para. 3.

terms but for its substantial reform, as the CLRC recommended. Since the CLRC made that recommendation in 1980 there have been a number of developments in the law, commented on below, all of which have strongly reinforced the need for reform along the lines proposed by the CLRC.

7.3 In this part of the Consultation Paper we therefore first explain the structural defects of the 1861 Act, and why it should in any event be replaced by a new code; then set out in more comprehensible language what we believe the present law on non-fatal offences against the person to be; and then indicate the weaknesses of that law and why and how it should be reformed.

The need for a new code

7.4 Sections 18, 20 and 47 of the 1861 Act are not part of a comprehensive legislative code; were not drafted with a view to setting out the various offences with which they deal in a logical or graded manner; in some cases do not create offences, but merely state the punishment for what is regarded as an existing common law offence; and, above all, in so doing employ terminology that was difficult to understand even in 1861. The sections are virtually the only significant part of the extensive series of criminal law statutes passed in 1861[74] that still remains on the statute book. Those Acts as a whole attracted early criticism, not least from Sir Fitzjames Stephen:

> "Their arrangement is so obscure, their language so lengthy and cumbrous, and they are based upon and assume the existence of so many singular common law principles that no-one who was not already well acquainted with the law would derive any information from reading them".[75]

More recent critics have agreed with these strictures, describing the 1861 Act as "piece-meal legislation", which is "a rag-bag of offences brought together from a wide variety of sources with no attempt, as the draftsman frankly acknowledged, to introduce consistency as to substance or as to form".[76]

7.5 That last statement, however, fairly observes that the Acts of 1861 were in effect intended to be consolidations of the existing law, without seeking to alter its theory, content or arrangement, and even without any of the rationalisation of language and structure that would, today, be thought a necessary part of a consolidation Bill.[77] This process thus ensured that the 1861 Act repeats without critical review the assumptions and the terminology of an even earlier age; but the draftsman thought that to be necessary in order to ensure enactment of the consolidation:

> "The fact that a clause contained the existing law in its very terms carried a weight with it that no reasoning would have obtained in the minds of those who are opposed to legal reforms".[78]

7.6 Such legislation is usually a precursor to, and indeed demands, a more far-reaching reform. Such reform has been effected, admittedly at a somewhat leisurely pace, in respect

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[74] These were, apart from the Offences against the Person Act itself, the Accessories and Abettors Act; the Larceny Act; the Malicious Injuries to Property Act; the Forgery Act; and the Coinage Offences Act.

[75] Letter to Sir John Holker, 20 January 1877, cited by Sir Rupert Cross in *Reshaping the Criminal Law* (ed. Glazebrook, 1978), at p. 10.

[76] Lord Ackner in *Savage* [1991] 3 WLR at p. 939E, citing, as to the second quotation, Professor J. C. Smith in [1991] Crim LR 43.

[77] "They are chiefly re-enactments of the former law, with amendments and additions. Each bill contains divers enactments taken from different statutes, and generally in the terms used in those statutes": C. S. Greaves Q.C., *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict.* (2nd edition, 1862), p. xxvi.

[78] Greaves, *op. cit.*, pp. 52–53 and 76. In the 1861 Act, s. 18 is taken from s. 4 of the Offences against the Person Act 1837; s. 20 indirectly from s. 29 of the (Irish) Offences against the Person Act of 1829; and s. 47 from s. 29 of the Administration of Criminal Justice Act 1851. The latter statute however simply regulated the punishment and mode of trial of what was regarded as a common law offence: see Greaves, *Lord Campbell's Acts* (1851), p. 32.

of most of the 1861 legislation, but that reform has so far stopped short of those parts of the 1861 Offences against the Person Act that deal with basic offences of personal violence. Their age alone would not, of course, be a reason for seeking the reform of sections 18, 20 and 47 of the 1861 Act. However, the arcane language of these sections, using concepts that were technical and obscure even in the nineteenth century, and their complex and overlapping arrangement, has caused repeated difficulty in the administration of a branch of the law that has to be considered literally thousands of times each year not only in the Crown Courts but also, in the case of sections 20 and 47, in the magistrates' courts, in which forum, staffed largely by lay judges, there is a particular need for the law to be clear and easy to handle.

7.7 In recent years, the attempts of courts at appellate level to elucidate the 1861 Act have led to a series of inconsistent or contradictory decisions,[79] causing the Court of Appeal (Criminal Division) to protest that "At a time when 'middle-rank' criminal violence is a dismal feature of modern urban life, and when convictions and pleas of guilty on charges under section 47 occupy so much of Crown Court lists it seems scarcely credible that 129 years after the enactment of the Offences against the Person Act 1861 three appeals should come before [the Court of Appeal] which reveal the law to be so impenetrable".[80]

7.8 Much of this particular, and intolerable, confusion has eventually been resolved by the speeches of the House of Lords in *Savage*. However, that that process had to be gone through at all demonstrates the weakness of the 1861 Act, and the hazards, expense and uncertainty that can result from the use of complex legislation the purposes of which cannot now be properly understood. The 1861 Act is, and continues to be, unsatisfactory in very many respects. We mention here a few of the more pressing reasons why it is wholly unsuitable as the defining authority for a major part of English criminal law.

7.9 We have already emphasised that the statute cannot be directly used as a statement of that law, because it contains terms that have to be translated into other language comprehensible to modern juries and magistrates, or even be entirely replaced, before the definitions of the crimes that it contains can be used to decide cases. Thus, the word "maliciously" is used in both section 18 and section 20 of the 1861 Act. The Court of Appeal has suggested that in *section 18* the word "maliciously" adds nothing, and that in directing a jury about an offence under that section the word is best ignored.[81] However, the House of Lords in *Savage* confirmed that in *section 20* "the *mens rea* [of the] crime is comprised in the word 'maliciously'";[82] though there was no suggestion that the Court of Appeal had been wrong in thinking that a judge in summing up a section 20 case should probably not mention the word "maliciously" or try to explain to the jury what it means.[83]

7.10 It is in our view highly undesirable that a statute in everyday use should contain an apparently important expression that in one section has no meaning at all; but, where the expression does have meaning, the actual words of the statute cannot be safely even mentioned to the jury when the judge is directing them as to what that meaning is. Whilst there are inevitably many statutory provisions that need explanation and expansion by the judge if the jury is to handle them properly, it cannot be right to persist with statutory language that is so misleading that it has to be ignored.

7.11 This need for courts interpreting these sections to concentrate to such a large extent on previous judicial exposition means that the offences under sections 18, 20 and 47 of the 1861 Act have become in effect common law crimes, the content of which is

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[79] *DPP* v *K* [1990] 1 WLR 1067; *Spratt* [1990] 1 WLR 1073; *Savage* [1991] 2 WLR 418. The two latter cases were decided by different divisions of the Court of Appeal on the same day. Both concerned the mental element necessary to be established in a charge under section 47 of the 1861 Act; the two courts unwittingly contradicted each other in their interpretation of that section.

[80] *Parmenter* [1991] 2 WLR 408 at p. 416.

[81] *Mowatt* [1968] 1 QB 421, at p. 426B.

[82] *Savage* [1991] 3 WLR at p. 939F.

[83] [1968] 1 QB at pp. 426C–427D.

determined by case-law and not by statute. There are two objections to that. First, as a matter of principle, the terms and proper extent of the criminal law of offences against the person should be determined by Parliament and not by the judges, and should be easily accessible by reference to statutory texts.[84] Second, on a more practical level, there are needless hazards in directing a jury not on the basis of a clear statutory text, but from judicial pronouncements, however distinguished the authors of those pronouncements may be.

7.12 A graphic illustration of the latter point is to be found in the trial judge's handling in *Parmenter* [85] of the authority binding him as to the meaning to be attached by the jury to section 20 of the 1861 Act. In *Mowatt* [86] Diplock LJ said that in section 20 the word "maliciously" indicated that the *mens rea* required for an offence under the section was subjective, but only to the extent that the accused must be aware that his act may have the consequence of causing *some* physical harm to some other person: "It is quite unnecessary that the accused should have foreseen that his unlawful act might cause physical harm of the gravity described in the section, i.e., a wound or serious physical injury. It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result." The context makes it quite clear that by this statement Diplock LJ indeed formulated a test that was "subjective", to the extent that it required actual foresight of *some* physical harm. In *Parmenter* the trial judge directed the jury on the charges under section 20 by reading to them the passage just quoted from Diplock LJ's judgment. The Court of Appeal however commented that

> "in *Mowatt* the words 'should have foreseen' were, we believe, intended to bear the same meaning as 'did foresee' or simply 'foresaw'. Read out of context, however, the ordinary meaning of the words 'should have' is 'ought to have'. By reading the passage to the jurors in isolation from its context the judge thus inadvertently created a real risk that the jurors would believe that they were being directed to ask themselves, not whether the appellant *actually* foresaw that his acts would cause injury, but whether he *ought to have* foreseen it".[87]

The convictions on the section 20 charges therefore had to be quashed for misdirection, even though the jury had been directed in the *ipsissima verba* of the then leading case on that section.

7.13 However, although the present state of the law owes much to judicial development, that development has not been the unconfined development of the common law, but rather an attempt to make intelligible the provisions of the 1861 Act. That in its turn means that the law continues to be influenced by the presumptions and principles that informed a statute which is now 130 years old, and whose terms survive in effect unchanged from the earlier years of the last century. As we have said, mere antiquity would not demand or justify a review of the law; but the provisions of the 1861 Act, as now authoritatively interpreted in *Savage*, compel a formulation of the law that it is difficult to justify on grounds of logic, efficacy or justice.

The present law

7.14 The guidance given by the House of Lords in *Savage* enables us to state with some certainty the content of the law under sections 18, 20 and 47 of the 1861 Act. For ease of reference we set those sections out below, translated so far as possible into modern language, and as interpreted by the courts. In most cases it is possible to explain the terms used in footnotes, but some following paragraphs deal with cases where more extensive explanation is required.

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[84] Those principles, that inform all our work on codification, are expounded more fully in paragraphs 2.2–2.7 of the Code Report. We believe them to be very widely accepted.

[85] [1991] 2 WLR 408.

[86] [1968] 1 QB p. 421 at p. 426D; upheld on this point in *Savage* [1991] 3 WLR at p. 939G.

[87] [1991] 2 WLR at p. 412A.

7.15 Despite the uncertainties of recent years, the law stated below does not differ in any essential respect from the interpretation of the 1861 Act that was current in 1980. It was the law as so interpreted that the CLRC thought to need urgent reform. In the concluding part of this section of the Consultation Paper we explain, with reference to our statement of the law, why we fully share the CLRC's view.

A restatement of sections 18, 20 and 47

7.16 **18**. A person is guilty of an offence, punishable by life imprisonment, if he wounds,[88] or causes any serious[89] bodily harm to, another, intending either

(i) to cause serious bodily harm to any person or

(ii) to resist the lawful arrest or detention of any person.

20. A person is guilty of an offence, punishable by 5 years' imprisonment, if he wounds, or inflicts[90] serious bodily harm upon, another, either

(i) intending to cause some physical harm[91] to any person or

(ii) foreseeing that some physical harm to any person may be caused.

47. A person is guilty of an offence, punishable by 5 years' imprisonment, if he causes any hurt or injury calculated to interfere with the health or comfort[92] of another by an act[93] by which he intended to cause, or that he foresaw might cause[94] either

(i) any person to fear immediate and unlawful violence[95] or

(ii) any physical contact with any person.[96]

Section 47: the meaning of "assault"

7.17 A pre-condition to liability under section 47 is the commission of an assault. It remains, however, to consider what is meant in this context by "assault". In paragraph 9 below we explain that in the general terminology of the criminal law "assault" is sometimes used to mean (physical) battery; sometimes to mean ("psychic") assault by causing another to expect such battery; and sometimes without distinguishing those two senses. In *Savage* the House appears at first sight to have identified the assault referred to in section 47 as psychic assault, since they said, in relation to a section 47 case, that it was "common ground that the mental element of assault is an intention to cause the victim to apprehend immediate and unlawful violence or recklessness[97] whether such apprehension be caused".[98] It is, however, unlikely that such, "psychic", assault can be the sole basis of liability under section 47.

7.18 The practical reason for thinking that psychic assault cannot be the *only* form of assault that will ground a charge under section 47 is that a person who is struck from behind, or when asleep, suffers only (physical) battery and not psychic assault. It cannot

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88 Any breach of the continuity of the victim's skin: *Archbold* (44th edition, 1992), para. 19–127.

89 *Metharam* (1961) 45 Cr App R 304.

90 The CLRC, Fourteenth Report at para. 153, pointed out that "inflict" is, marginally, narrower than "cause". This formulation, different from that in section 18, that is adopted in section 20 of the 1861 Act, therefore requires a distinction in formulation between the two sections.

91 *Savage* [1991] 3 WLR at p. 939H.

92 This is the meaning of "actual bodily harm" adopted in *Miller* [1954] 2 QB at p. 292. For the extent to which that expression includes *mental* harm, see paragraphs 8.20–8.33 below.

93 Paragraph 7.21 below.

94 See paragraph 7.17, n. 97 below.

95 Paragraph 7.17 below.

96 Paragraphs 7.18–7.20 below.

97 Fairly clearly meaning here actual awareness, and not merely objective recklessness.

98 *Savage* [1990] 3 WLR at p. 928F, citing *Venna* [1976] QB 421.

have been intended to exclude such cases from the reach of section 47. Even more pressingly, a victim who does not have developed thought processes, such as a very young child, does not apprehend (or, at least, cannot be proved to apprehend) violence as part of the experience of being struck. Such a child was the victim in *Parmenter* itself,[99] where the father's liability under section 47 must thus have rested on battery only. Plainly, therefore, and despite the House of Lords' apparent formulation of assault in exclusively psychic terms,[100] battery as well as psychic assault must be included within the definition of assault under section 47.

7.19 At the same time, however, battery cannot supply the whole of the meaning of assault in section 47. Psychic assault, emphasised by the House of Lords' citation of *Venna*,[101] must also be included. That view is reinforced by consideration of *Roberts*,[102] the case principally relied on by the House of Lords in *Savage* as correctly setting out the proper interpretation of section 47.[103] In that case the assault relied on was a battery, attempting to take off the victim's coat. That assault came within section 47 because it caused the victim to jump out of the car in which she was travelling with the accused in order to escape his attentions, with the result that she suffered actual bodily harm. It is, however, very difficult to think that the case would have had a different result if the accused had merely threatened the victim with violence or sexual assault, thus causing the same reaction without actually laying hands on her.[104]

7.20 We make these points with some caution because the House of Lords does not specifically discuss this issue, and indeed summarises the conclusion of the Court of Appeal in *Parmenter* as to the respects in which the decisions of that court in *Spratt* and *Savage* were in accord as being that "Where the defendant neither intends nor adverts to the possibility that there will be any physical contact at all, then the offence under section 47 would not be made out",[105] a formulation that would seem on its face to exclude psychic assault as a ground of liability. Nevertheless, we venture to doubt whether that can have been intended. The only safe course is to assume that assault in section 47 of the 1861 Act is to be interpreted as including not only psychic assault, but also battery, in the sense of any intentional or reckless physical contact with another.

Section 47: causation

7.21 The actual bodily harm has to be "occasioned" by the assault.[106] In *Savage* the accused, who had a full pint glass in her hand, threw the contents over a Miss Beal, but also let go of the glass, which broke and cut Miss Beal's wrist. She claimed that the glass slipped from her hand, and was not deliberately thrown. On those facts, the Court of Appeal held that "The test is objective—was the cut on Tracey Beal's wrist a natural consequence of the appellant's deliberate action in throwing the beer?";[107] and the House of Lords analysed the causal issue by saying:

> "It is of course common ground that Mrs. Savage committed an assault upon Miss Beal when she threw the contents of her glass of beer over her. It is also common ground that however the glass came to be broken and Miss Beal's wrist thereby cut, it was, on the

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[99] *Savage* [1991] 3 WLR at p. 920H.

[100] See n. 98 above.

[101] *Ibid.*

[102] (1971) 56 Cr App R 95.

[103] *Savage* [1991] 3 WLR at pp. 928H–930E.

[104] The court in *Roberts* cited with approval, on the causation point, *Beech* (1912) 7 Cr App R 197. That was a case under section 20 of the 1861 Act, and thus not directly in point. It did, however, involve only a threat of violence, and it seems likely that if the court in *Roberts* had seen an important, or any, distinction between battery and psychic assault in the context of section 47 they would have treated *Beech* with more reserve.

[105] *Savage* [1991] 3 WLR at p. 924D. The House's formulation is not a verbatim quotation from the judgment in the Court of Appeal in *Parmenter*, but rather a statement of the effect of the remarks of that court at [1991] 2 WLR 414H–415C.

[106] *Savage* [1990] 3 WLR at p. 930E.

[107] [1991] 2 WLR 418 at pp. 421–422; cited in *Savage* [1990] 3 WLR at p. 920C.

finding of the jury, Mrs. Savage's handling of the glass which caused Miss Beal 'actual bodily harm'.[108]

A court must therefore go through a two-stage process. First to see whether an assault has been committed, and then to determine whether actual bodily harm has been caused by, or was a natural consequence of, the act that is found to constitute the assault: in *Savage* itself, "Mrs. Savage's handling of the glass".

The need for reform

The subjectivist approach

7.22 The long-standing assumption of English criminal law, at least in respect of offences against the person, has been that citizens should only be convicted of serious crimes, imposing serious punishment, on a "subjective" basis: that is, that it should be necessary to prove actual intention or foresight on the accused's part. The CLRC never thought it appropriate even to question that that was the proper approach to the law of offences against the person; and although there have in recent years been doubts expressed, some of them from weighty sources,[109] as to whether subjectivism can best solve all of the law's problems, there has never been any worked-out demonstration of how any other approach to offences against the person might achieve both the justice and the efficiency that this part of the law demands.

7.23 Further questions of this sort have arisen as a result of the abandonment of subjective recklessness, in respect of offences of damage to property, by the House of Lords in *Caldwell*;[110] it was indeed the suggestion[111] that the "objective" approach of *Caldwell* should apply to all offences of which "recklessness" forms part of the *mens rea* that gave rise to serious doubts as to the proper approach to offences of "malice" under the 1861 Act, which latter concept had been analysed, albeit without direct statutory authority, in terms of recklessness.[112] In *Savage*, however, the House of Lords closely analysed the relationship between *Caldwell* and *Cunningham*, and concluded that in respect of section 20 of the 1861 Act the *Cunningham* test of actual foresight on the part of the accused remained the law.[113] This conclusion may be thought to indicate, amongst other things, that their Lordships in *Savage* saw no difficulty, or at least no overriding difficulty, in the proof of the actual state of mind of an accused, a matter that had given the majority of the House pause in *Caldwell*. However, to recognise the practical viability of a law of offences against the person based on subjective awareness does no more than to confirm the long-standing interpretation of the 1861 Act: for it will be seen from the account of sections 18, 20 and 47 set out in paragraph 7.16 above that each of those offences requires proof of *some* subjective state of mind.

7.24 Where the definition of these offences causes difficulty, however, is in requiring subjective fault not as to the harm or damage that the accused has actually caused, but as to some different, and often less serious, harm. That irrationality is increased by the failure of the 1861 Act to provide a reasoned scale of offences, based on the seriousness of the injury intended or caused, or to distinguish properly between the seriousness of offences on that basis. We deal with those objections in the next two sections.

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108 *Savage* [1990] 3 WLR at p. 928F.

109 e.g. Sir Rupert Cross in 83 LQR 215 and 91 LQR 540. Professor Cross was, however, a member of the CLRC that, as we indicated in the text, recommended, without demur, a subjective formulation of such offences.

110 [1982] AC 341.

111 By Lord Roskill in *Seymour* [1983] 2 AC 493 at p. 506. This observation was *obiter*: see the Court of Appeal (Criminal Division) in *Spratt* [1990] 1 WLR 1073 at p. 1082F.

112 *Cunningham* [1957] 2 QB 396.

113 [1991] 3 WLR at p. 938G.

The 1861 Act: degrees of injury

7.25 In the 1861 Act the prohibited results of the accused's conduct are distributed between the various sections in an irrational way. Thus, since both section 18 and section 20 are concerned with *serious* bodily harm, the only offence that controls the infliction of actual (i.e. non-serious) bodily harm is section 47. That section does not, however, focus directly on responsibility for the infliction of (actual) bodily harm, but rather uses the two-stage test of, first, responsibility for an *assault*, from which, second, actual bodily harm then in fact results.

7.26 Even leaving aside the confused structure of section 47, the apparent distinction in respect of prohibited results between sections 18 and 20, on the one hand, and section 47 on the other hand, is rendered largely illusory in practice by the inclusion of wounding as an alternative ground of liability in sections 18 and 20. Even a very minor incident can amount to a wounding:[114] the interference with the victim does not have to be in any way sufficient to count as "serious" were that interference to be analysed under the alternative categorisation of bodily harm. What may be the quite fortuitous causing of a minor wound will, therefore, radically alter the level of seriousness attributed by the law to the results of the accused's conduct.

7.27 Thus, although section 20 is generally accepted as creating a crime that is more serious than that created by section 47,[115] the distinction between the two sections is far from clearly stated. At least if the injury to the accused can be characterised as a wound,[116] there is little difference between the forbidden consequence under section 20 and the forbidden consequence, actual bodily harm,[117] under section 47. There is some distinction between the consequence that must be foreseen by the accused under section 20, "some physical harm . . . albeit of a minor character",[118] and the fear of (mere) physical contact, foresight of which is required by section 47: but any such distinction is rendered unreal by the two sections providing for the same maximum penalty of five years' imprisonment.

The 1861 Act: Erratic application of the accused's fault

7.28 The greatest problem of the present law, however, is the lack of coherence in sections 20 and 47 between the consequences for which the accused is punished and the mental state that is sufficient for a conviction.[119] Thus section 20 is, in a non-wounding case, directed at punishing the infliction of *serious* bodily harm; but all that the accused needs to have foreseen as the result of his actions is any minor physical harm.[120] Similarly, section 47 is directed at punishing the causing of actual bodily harm; but all that the accused needs to have foreseen as the result of his actions is either fear of violence on another's part or any "physical contact" with any person. The latter expression has, we think, the same reach as the concept of applying force to, or causing an impact on, the body of another, that we recommend as the basis of the offence of assault that is contained in clause 8 of the present Bill.[121] It is clearly different from, and is intended to be different from, the causing of bodily *harm*, in the sense of injury.

7.29 The House of Lords in *Savage* commented on this incoherence between the acts forbidden by the offences and the required mental state, but not from the point of view of

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[114] *Archbold* (44th edition, 1992), para. 19–127.

[115] See the Court of Appeal in *Parmenter* [1991] 2 WLR at p. 416F.

[116] See paragraph 7.26 above.

[117] "Any hurt or injury calculated to interfere with the health or comfort of the prosecutor": see paragraph 7.16, n. 92, above.

[118] *Savage* [1991] 3 WLR at p. 939H. This definition is unlikely in practice to be different from *actual* bodily harm.

[119] We limit this criticism to sections 20 and 47 because the only serious issues for discussion arise in respect of those sections. We should, however, point out that under the second limb of section 18, relating to intent to resist arrest or detention, it is in terms the law that a person is liable to imprisonment for life if, in the course of resisting arrest, he wholly unintentionally causes a very minor wound to another person. Since we do not think that it could be seriously contended that that law is supportable we do not discuss it further.

[120] See paragraph 7.27, n. 118, above.

[121] See paragraph 9.10 below.

general principle. The House was pressed with an argument that the analysis of section 20 adopted by Diplock LJ in *Mowatt*,[122] that all that the accused need foresee is "some physical harm to some person, albeit of a minor character", was incorrect, because of an alleged "general principle" that "a person should not be criminally liable for consequences of his conduct unless he foresaw a consequence falling into the same legal category as that set out in the indictment".[123] The House however pointed out that such a principle did not apply generally throughout the criminal law, citing murder and manslaughter as examples. The construction of section 20, and in particular the implications of the word "maliciously" as used in that section, could not, therefore, be determined by any such principle.

7.30 That, however, leaves open the more general question of whether, when one is considering general policy, and not merely the irrational results of piece-meal legislation,[124] an incoherence between the consequence for which the accused is punished and the accused's mental state with regard to that consequence is desirable. The view of the CLRC[125] was that it is not. That is our view too, for the reasons set out in the next section.

The defects of the law

7.31 The law in the 1861 Act is defective on grounds both of effectiveness and of justice. It is commonly thought to be unjust to punish people for results of their conduct that they neither intended nor foresaw. Very pressing reasons of practicality or social protection are, therefore, required before such punishment can properly be inflicted. As we point out in paragraph 7.23 above, no such reasons based on what is sometimes alleged to be the practical impossibility of operating any sort of system of subjective liability can be advanced in the present case; and the general structure based on the 1861 Act has been created not for other reasons of policy or practicality, but by the accident of legislative history.

7.32 However, a law is not truly subjective, indeed does not in any way fulfil the moral and social arguments that support the subjectivist approach to criminal liability, if, as in the 1861 Act, what the accused has actually to foresee differs so much from that which he is accused of causing.[126]

7.33 In section 20, all that the accused has to foresee is any minor physical harm. The consequence for which he is punished, the causing of serious bodily harm, may arise quite unforeseeably: yet he is still criminally liable for *that* consequence. Thus, for instance, an accused might push someone aside roughly in the street: unknown to him, they have unusually brittle bones, and suffer a fracture; or they step on to a concealed hole in the pavement, fall through, and break their leg. Similarly in section 47, all that the accused has to foresee is any physical contact: the actual bodily harm for which he is punished may equally arise entirely unforeseeably. Thus in *Savage* itself,[127] Mrs. Savage would have been liable even if it had been proved that the injury to Miss Beal occurred only because of an entirely unforeseeable structural weakness that caused the glass to splinter when vigorously handled: that the injury was unforeseeable would not avail her, once it had been established that she foresaw some physical contact to Miss Beal emanating from her handling of the glass, albeit contact in the quite different form of Miss Beal having beer poured over her.

7.34 In all such cases, the accused is at most negligent (and, at least in the version of the facts of *Savage* suggested in paragraph 7.33 above, not even negligent) as to the injury

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122 See paragraph 7.12 above.

123 *Savage* [1991] 3 WLR at p. 939C.

124 *Savage* [1991] 3 WLR at p. 939E, cited in n. 76 above.

125 *Working Paper on Offences against the Person*, 1976, paras. 110–117; and Fourteenth Report, paras. 149–152.

126 See paragraphs 7.28–7.30 above.

127 See paragraph 7.21 above.

for which he is punished. It is difficult to see how that can be a justified basis for criminal, as opposed to civil, liability. We have already indicated that, so far as we are aware, no reasons of practicality have been advanced in support of the 1861 Act. We should, however, mention some considerations that might be thought relevant, from a practical point of view, in assessing the merits of a law that only convicts the accused for causing injury of a category that he intended or actually foresaw.

7.35 First, in none of the cases suggested in paragraph 7.33 above should or would the accused be free of all criminal liability. If he intends or foresees actual harm, he should be punished for that; and in the *Savage* case itself, pouring the beer is a common assault, punishable by six months' imprisonment, and will remain an assault, similarly punishable, under the present Bill.[128] Second, in the present law, and in the law as recommended by the CLRC[129] and in the present Bill,[130] recklessness extends to being aware of a *risk* that a consequence may occur. That is a fairly broad test: as the CLRC indicated,[131] it does not give an accused licence implausibly to claim that he did not appreciate a likely risk; and it certainly does not require the prosecution to prove that the accused foresaw all the details of what in fact occurred.

7.36 That law of recklessness would operate rationally and effectively if the categories of risk as to which the accused had to be shown to be reckless were set out in a graded manner, that discriminated between the more and the less serious types of injury, and thus between different types of risk. In the 1861 Act, however, the types of injury are distributed between the various sections in a muddled and irrational fashion and, in particular, the only section that clearly focuses on the causing of harm that is not characterised as "serious" is section 47.[132] In *Savage* the House of Lords commented, in relation to section 20, that "If section 20 was to be limited to cases where the accused does not desire but does foresee wounding or grievous bodily harm, it would have a very limited scope."[133] But any fear as to the limited scope of the law *as a whole* can be set aside if there are other offences, defined in terms of non-"serious" harm, that impose sufficient penalties for conscious infliction of that harm. The structure of offences recommended by the CLRC, and adopted in clauses 4–6 of the present Bill, achieves that end by distinguishing clearly, and in different offences with different maximum penalties, between serious and other injury, and by imposing liability according to which of those broad categories covers the harm that the accused took the conscious risk of causing. He will thus be punished according to a broadly practical classification of his subjective fault.

7.37 Finally, it might be argued that the apparent severity of the cases suggested in paragraph 7.33 above could and would be mitigated by taking account of the accused's actual culpability at the sentencing stage. But it is unsatisfactory, unless there is no other viable solution, to seek to deal with what are truly issues of liability by means of judicial sentencing discretion; and very demeaning to the jury for them to be instructed to ignore the accused's actual intention or foresight in determining which crime he has committed, only to find that the judge relies on that very factor in deciding that the accused should not suffer the normal penalty for the crime of which the jury have just convicted him.

7.38 Not only is the law under the 1861 Act unjust, but also its structure and statement are inefficient. Although magistrates and juries are now, by the decision in *Savage*, saved from some of the worst excesses of the statute, such as the need to speculate upon the meaning in 1992 of the word "maliciously", they are still faced with offences stated in complex terms, that puzzlingly use widely different concepts (e.g. serious bodily harm/ some physical harm) within the same definition; or with the complex analysis of causation that, as we explained in paragraph 7.21 above, is now required under section 47 of the

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[128] See paragraph 9 below, and clause 8 of the Bill.

[129] Fourteenth Report, paras. 11–12.

[130] Clause 2(b): see paragraph 5.13 above.

[131] Fourteenth Report, para. 12.

[132] See paragraphs 7.25–7.26 above.

[133] [1991] 3 WLR at p. 939F.

1861 Act. It is very difficult to see why laymen should be put to the trouble of understanding these complexities, and judges and magistrates' clerks be put to the trouble of trying to explain them, unless there are strong practical reasons for the law to take that form. But, far from there being any positive argument in favour of the present state of the law, that law has only reached its present form through accidents of history in 1861 and before.

7.39 The injustice and the inefficiency of the law under the 1861 Act combine to make that law an inept vehicle for conveying society's disapproval of violence, and the penalties with which violence will be met. At best, the 1861 Act contains a muddled message: that the same penalty is envisaged for causing both serious (section 18) and minor (section 20) harm; and that although the law purports to punish and control subjective fault, that fault is not linked to the damage caused, and is irrelevant to the punishment that the law provides. That law does not clearly single out those who contemplate violence as proper objects of deterrence and punishment because of the violence that they contemplate rather than the harm that they accidentally cause; nor does it distribute that punishment according to the subjective intentions, and thus the social fault, of the accused. Such a law, resting as much as it does on chance or the causing of unintended harm, does not properly convey society's message that violence is taken seriously, and will be punished according to the seriousness of the accused's conduct.

7.40 The interests both of justice and of social protection would be much better served by a law that was (i) clearly and briefly stated; (ii) based on the injury intended or contemplated by the accused, and not on what he happened to cause; and (iii) governed by clear distinctions, expressed in modern and comprehensive language, between serious and less serious cases. Fortunately such a law stands ready, in the proposals for the reform of the 1861 Act made by the CLRC in their Fourteenth Report in 1980. Had those proposals, or the substance of them, been adopted in 1980 there could not have occurred the serious expenditure of judicial time taken up in rectifying, and the extensive uncertainty caused by, the developments that culminated in *Savage*.

7.41 We have reviewed the proposals of the CLRC in the light of *Savage*, and remain of the opinion that a law broadly based on them should be introduced as soon as possible to solve the difficulties caused by the 1861 Act. In the next section of this Consultation Paper we indicate the nature of the CLRC's proposals and the terms in which we think they should be expressed in legislation; and invite comment on the terms of the Bill now proposed.

E. THE CLRC'S PROPOSALS AND THE BILL

8.1 The CLRC heavily criticised the then existing law, saying that "no one who has worked with the Act of 1861 will doubt that it is overdue for replacement",[134] and proposed that replacement by a simplified set of offences that clearly indicated what had to be proved against the defendant, and clearly distinguished between acts of differing degrees of gravity.

8.2 The CLRC's basic conclusions were:

(i) The distinctions in the 1861 Act between wounding and various types of "bodily harm" should be swept away, in favour of the simpler concept of "causing injury";[135]

(ii) there should be a distinction between serious injury and other injury;

(iii) in respect of serious injury there should be a distinction between intentionally causing such injury and (subjectively) recklessly causing such injury.

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134 CLRC, Fourteenth Report, para. 3.

135 CLRC, Fourteenth Report, para. 3.

8.3 In respect of the latter two proposals the CLCR said:

> "Just as there is a need to separate death caused by an intentional act (murder) from death caused recklessly (manslaughter), in order to distinguish the gravest from the less grave forms of homicide, there is similarly a need to separate the intentional causing of serious injury from the reckless causing of serious injury. There is, in our opinion, a definite moral and psychological difference between the two offences which it is appropriate for the criminal law to reflect".[136]

The Committee however thought that, in respect of non-serious injury, it would be too complex to have a structure of offences that required a distinction, affecting the offence charged, between intentional and reckless conduct even in respect of the most trivial injury. They therefore concluded that their general principles would be adequately served by a single offence of causing injury either intentionally or recklessly.

8.4 The CLRC therefore expressed its recommended scheme of new offences as follows:

> (a) causing serious injury with intent to cause serious injury, punishable with a maximum penalty of life imprisonment;
>
> (b) causing serious injury recklessly, punishable with a maximum penalty of 5 years' imprisonment and triable either way;
>
> (c) causing injury recklessly or with intent to cause injury, punishable with a maximum penalty of 3 years' imprisonment and triable either way.[137]

8.5 We agree with the broad structure of this approach, which in our view accurately distinguishes between the more serious and the less serious offences, and ensures that, as is consistent with the general principles that we have expounded in paragraph 7 above, the accused is punished according to the type of injury that he intended or was aware that he might cause. The distinction in penalty between the second and third offences will also cure the present anomaly, which we understand to cause difficulties both for courts and for prosecutors, that although the conduct envisaged by section 20 of the the 1861 Act purports to be more grave than that envisaged by section 47, the maximum penalty under both sections is the same.

8.6 In the Draft Code[138] we adopted the substance of the recommendations of the CLRC, subject to a few minor amendments, and we do the same in clauses 4–6 of the present Bill, which provide:

> **4.–(1) A person is guilty of an offence if he intentionally causes serious injury to another.**
>
> **(2) A person may be guilty of an offence under subsection (1) above if either-**
>
> **(a) the act causing injury is done, or**
>
> **(b) the injury occurs,**
>
> **in England and Wales.**
>
> **(3) Section 3 [which imposes liability for omissions] applies to an offence under this section.**
>
> **5.–(1) A person is guilty of an offence if he recklessly causes serious injury to another.**
>
> **(2) Section 4(2) applies also to an offence under this section.**

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[136] CLRC, Fourteenth Report, para. 152.

[137] CLRC, Fourteenth Report, paras. 152 and 155–157.

[138] Clauses 70–72.

6. A person is guilty of an offence if he intentionally or recklessly causes injury to another.

We now comment on some particular aspects of these clauses.

Intention and recklessness

8.7 The concepts of acting intentionally or recklessly that are adopted in clauses 4–6 will be interpreted according to the definitions in clause 2 of the Bill that are explained in paragraph 5 above. It is one of the principal aims of the Bill to provide clear and workable definitions of fault terms.

8.8 The clause 2 definition of "intentionally" enables us to replace the CLRC's formula of "causing serious injury with intent to cause serious injury"[139] with the simpler concept of intentionally causing serious injury. The clause 2 definition of "recklessly", and its application to the clause 5 definition of recklessly causing serious injury, establishes by statute that liability for a type of consequence depends on the accused's foresight of that type of consequence.[140]

Injury

8.9 The CLRC proposed that there should be no definition of the terms "injury" or "serious injury" used by them, though they thought it necessary to make clear, by a separate provision, that injury includes unconsciousness.[141] In the Draft Code we substituted for those terms the expressions "personal harm" and "serious personal harm,"[142] clause 6 of the Draft Code making clear that "personal harm" meant harm to body or mind, and included pain and unconsciousness.[143] This formulation has been criticised by Dr. Glanville Williams[144] on a number of grounds, which call in question both the terminology of the Draft Code and the policy adopted therein. We are not persuaded by all of Dr. Williams' criticisms, but we do think that a number of them raise important issues for discussion, that have not yet been the subject of proper consultation either by the CLRC or by ourselves. We therefore in this section of the Consultation Paper set out various issues on which we specifically invite comment by consultees.

"Injury" or "personal harm"

8.10 Dr. Williams criticises the Draft Code's use of the term "personal harm" as an inappropriate change from the expert opinion of the CLRC, on two main grounds: first, and linked to other objections considered later, the Draft Code's formulation might be read as extending the law too widely. Secondly, "injury" is a much more natural colloquial expression than harm to express actual damage to body or mind (with which this part of the law is concerned), as opposed to merely economic harm.

8.11 We see some force in both of these criticisms. If only by a narrow margin, the word "injury" seems more appropriate than "personal harm" to describe the appreciable interference with the complainant's body or mental state to which, on any view, the criminal law should be limited; and similarly, although it cannot be said that the word "injury" inevitably excludes reference to merely economic loss,[145] we tend to agree with the CLRC that it is a shorter and more natural way of indicating the basic idea of damage to the person than is an (albeit qualified) reference to "harm". We have therefore

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[139] See paragraph 8.4(a) above.

[140] See paragraph 7.36 above.

[141] CLRC, Fourteenth Report, para. 154.

[142] Draft Code, clause 70.

[143] Code Report, paragraph 14.35.

[144] [1990] New LJ 1227.

[145] See e.g. *Davies* v *Whiteways Cyder Co.* [1975] 1 QB 262: increased liability for estate duty an "injury resulting from death" under section 2 of the Fatal Accidents Act 1846.

provisionally restored in the Bill the concepts of injury and serious injury as used by the CLRC; but we invite comment on that usage.

8.12 We should emphasise that in our view the actual word used to identify the conditions referred to is less important than the way in which that word is defined, limited and referred to in the legislation. We are, however, at present minded to think that in the process of definition it is more appropriate to start from the narrower concept of "injury", and then specifically add to that concept particular cases that the law should cover, than to use a more all-embracing basic concept of "personal harm", that might then have to be specifically limited, and thus might not be limited with sufficient certainty, to exclude cases that were not appropriately covered by the serious offences with which we are here concerned. We deal at some length in paragraphs 8.16ff below with these problems of definition, with particular reference to the nature of the physical and mental interference with the victim that should be punishable by the present offences.

Inclusion of minor injuries

8.13 The formulation of the Draft Code, and of the Bill, would include under the offence created by clause 6 of the Bill any outcome that could be legitimately described as an injury (or personal harm), however trivial the damage might be. Dr. Williams suggested that that may lead to cases falling under clause 6 that are inappropriate for an offence that carries a maximum penalty of three years' imprisonment. We have some sympathy with this view, but the problems are, first, deciding what type of injury might be sufficiently minor to be excluded from the reach of a crime that punishes the infliction of injury;[146] and, second, finding a legislative formula that would accurately encapsulate whatever conclusion was reached on the first question.

8.14 We find attractive the view that any event that can properly be described as causing an *injury*, as opposed to the application of force or causing an impact with which the crime of assault under clause 8 of the Bill is concerned, should be prosecutable under the more serious offences contained in the present clauses. We, therefore, provisionally propose that the offence in clause 6 which, unlike those in clauses 4–5, is not limited to *serious* injury, but extends to any injury, should indeed cover injury of any gravity. Where such injury was indeed of a minor degree we would expect that fact to be taken into account by prosecutors in deciding whether to charge under clause 6 rather than for an assault under clause 8; and, as in all cases, the extent of the injury would be a factor to be taken into account by a sentencing court in determining where, in the spectrum of possible penalties below the statutory maximum, the particular case should fall.

"Serious" injury

8.15 We agree with the CLRC that no attempt should be made to define "serious" injury.[147] This, again, is essentially a matter of judgement, and it is necessary, and indeed in our view desirable, that it should be left to the jury in each case to decide whether a particular harm is serious. This solution has been questioned by Dr. Williams, but we think that the length and complexity of the formulation that he proposes as a statutory definition of serious injury[148] in fact helps to illustrate the difficulty attendant on such an enterprise.

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[146] The difficulty of this issue is perhaps illustrated by Dr. Williams' approving citation of the Canadian case of *Dupperson* (1984) 16 CCC (3d) 453, in which it was conceded that four bruises, each four inches long and one-quarter to one-half an inch wide, resulting from strapping on the bare buttocks, were not "bodily harm . . . that is more than merely transient or trifling in nature" under clause 245.1(2) of the Canadian Criminal Code. There is clearly room for substantial disagreement as to whether the injury described is properly excluded from the Canadian Code classification; and whether such injury should, indeed, be excluded from the potential reach of the sanction provided by clause 6 of the present Bill.

[147] CLRC, Fourteenth Report, para. 154.

[148] [1990] New LJ at p. 1229.

Injury to body and to mind

Background

8.16 Clause 6 of the Draft Code went no further than to say that "personal harm", the expression used in the Code, meant harm to body or mind, and included pain and unconsciousness. More detailed consideration of the problems of definition for the purposes of the present exercise has, however, revealed, first that closer attention needs to be paid to the definition of physical injury; and, secondly, that much more detailed discussion is required of the policy issues affecting whether, and to what extent, the serious offences set out in clauses 4–6 of the present Bill should extend to the causing of effects on the mind.

8.17 We deal with the latter question in paragraphs 8.20ff below. So far as physical injury is concerned, it should first be noted that, in the vast majority of cases, there will be no dispute as to whether or not what has occurred is an "injury". Broken bones, bruises, cuts and abrasions, which are the subject of almost all cases of offence against the person, all evidently fall within the description of physical injury. There may, however, be other conditions the causing of which should be criminally punishable, but which do not so clearly fall under that rubric. Two examples are pain and unconsciousness which the Commission, following the CLRC, specified in clause 6 of the Draft Code. A further case is the intentional or reckless inflicting of illness or disease.[149] There are other conditions the causing of which the criminal law might wish to punish; for instance, the inducement of vomiting.

8.18 In order to accommodate these possibilities we propose, in clause 1(6) of the Bill, to provide that (so far as physical injury is concerned)

> "injury" means physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition.

The last part of this definition is admittedly broad, but we think that a provision in these terms, or something like them, is necessary to bring within the present offences cases of the type discussed in paragraph 8.17 above. We invite comment on whether the provision is indeed necessary, and justified, and whether it contains the appropriate elements of the offence.

8.19 One virtue of a definition in the form that we suggest should be that it is simple to use. Although the definition of "injury" in terms of "physical injury", i.e. by repeating the word to be defined, may appear inelegant, it is very important that in the vast majority of straightforward cases the court should be able to talk simply in terms of the basic and easily recognisable expression, "injury", and not have to wrestle with the language that is necessary to cover the more out-of-the-way events. That is, we think, achieved by the present draft, that will enable the judge to tell the jury in almost all cases that they are concerned, and concerned only, with the principal case specified in the statute, of whether what was inflicted was a physical injury. We believe that to be far preferable to stating what the jury has to consider only in general terms, such as "impairment of a person's physical condition", that would perhaps cover all cases in one phrase, but at the expense of unnecessary difficulty in the vast majority of those cases.

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[149] See *Clarence* (1888) 22 QBD 23. The accused, who had intercourse with his wife when he knew, but she did not, that he was suffering from gonorrhoea, was charged under sections 20 and 47 of the 1861 Act. His conviction was, by a majority, quashed by the Court for Crown Cases Reserved, the reasons being either that (under section 47) a man could not, in these circumstances, "assault" his wife, or that (under section 20) he had not "inflicted" harm. The first of these views rests on a concept of the criminal implications of violence within marriage that is no longer the law: see our Working Paper No. 116, *Rape Within Marriage*, at para. 2.10, and the speeches in the House of Lords in *R* v *R* [1991] 3 WLR 767. And, apart from that point, *Clarence* does not suggest that the accused could not have been convicted of an offence expressed, as are the offences in clauses 4–6 of our Bill, in terms of "causing" [disease].

Injury to mind: introduction

8.20 Clause 6 of the Draft Code made clear that "personal harm", the expression used in the Code, meant harm to body or mind, and included pain and unconsciousness. The issue of whether, and to what extent, harm "to the mind" should be included in the possible grounds of liability for the serious offences contained in the 1861 Act, and now to be replaced by the offences in clauses 4–6 of the present Bill, is one of some difficulty. It has not so far received the consideration that it requires, and in this Consultation Paper we set out a series of issues on which we require the advice of consultees.

8.21 It should first be borne in mind that the offences with which we are concerned can only be committed intentionally or recklessly. Many of the problems associated with the *negligent* causing of nervous shock in the law of tort therefore do not arise. And, for the same reason, criminal offences involving the infliction of mental injury (however defined), as opposed to physical injury, are not likely to be frequent occurrences. It is, however, perfectly possible to imagine cases that demand an answer to the question of whether there should be criminal liability for inflicting harm to the mind and, if so, to what extent that liability should be limited.

8.22 Thus, the accused may know that the victim suffers from some particular nervous condition, may deliberately excite the symptoms of that condition. Or, perhaps more pressingly, if mental conditions are comprehended within the general concept of injury or harm, an accused whose attempt physically to injure a victim miscarries, but who thereby causes a mental condition included within the definition of "injury", would be liable for causing a legally prohibited result, though in a different form from that which he intended. Thus, if the accused foresees physical injury to A from, for instance, attacking A with a knife, but his aim misses and causes no *physical* injury to A, he will still commit a crime if, as a result, A suffers any type of mental harm that was included within the definition of "injury" for the purposes of clauses 4–6 of the present Bill; and, indeed, he will also commit that crime, under the doctrine of transferred fault that is part of the common law and which is put into statutory form in clause 25 of the present Bill, if B, a bystander, suffers the required form of mental harm. Such cases clearly pose the question of whether and to what extent harm to the mind should be included in "injury" for the purposes of clauses 4–6 of the Bill.

The present law

8.23 The present law on this subject is very far from clear. In *Miller*[150] Lynskey J held that an assault that caused a hysterical and nervous condition was an assault occasioning actual bodily harm because "an injury to her state of mind for the time being . . . is within the definition of actual bodily harm". It has, however, never been determined whether *all* conditions that could be described generally as "harm to the mind" fall within the range of *criminal* injuries that are recognised by the present law. Such a classification would include, within actual bodily harm under section 47 of the 1861 Act, the merely emotional conditions, such as grief, anxiety or distress, that are not recognised as a ground for the recovery of damages even in the civil law of negligence.[151]

8.24 The CLRC did not address this issue in its Fourteenth Report, saying that

> "Injury is a word in ordinary use in the English language, is readily understood and will cause little problem of interpretation. We consider that it may not, however, be clear that injury includes unconsciousness. It should do so and we recommend that there should be express provision to this end".[152]

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[150] (1954) 38 Cr App R 1; cited on this point in *Archbold* (44th edtion, 1992), para. 19–197.

[151] See, e.g., *Alcock* v *Chief Constable of South Yorkshire* [1991] 2 WLR 814 at p. 817E (Hidden J); and [1991] 3 WLR 1057 at pp. 1104C (Lord Ackner) and 1118G (Lord Oliver of Aylmerton).

[152] Fourteenth Report, para. 154.

While this approach will not cause difficulty in the vast majority of cases, consideration should in our view be given to determining more clearly the extent of criminal liability for mental harm. The possible options, on all of which we seek comment, would seem to be as follows.

"Injury" or "harm" undefined

8.25 This would leave a great deal to the judgement of the jury or magistrates: much more than in the case of distinguishing between injury and "serious" injury.[153] It would also, we think, leave issues of genuine doubt unresolved. It would be unclear whether, and to what extent, the somewhat fragile authority on which, at present, liability for mental injury rests[154] applied to the new statutory law. The fact that the CLRC thought that a special term had to be included to ensure that "injury" extended even to unconsciousness[155] suggests strongly that the answer to that question is not self-evident, and will not be self-evident to courts that have to use such a provision. However, if a court were to conclude that mental harm was included within (undefined) injury it would have no guidance as to the limits, if any, that should be placed on the definition of such injury.

8.26 For these reasons, we are minded to think that the Bill should provide some further guidance to courts: that, however, depends in turn on what the terms of that guidance should be.

Limitation to physical injury

8.27 We mention this possibility for completeness, but we do not think that it is a serious proposition. To determine now that only injury that could be described as "physical" could, in any circumstances, be the subject of the law of offences against the person would be to reverse the position that has been thought to exist since at least 1954.[156] It would also permit the causing with impunity of injuries that on any view can be quite as harmful as injury to the physical body.

Specific inclusion of all "harm to the mind"

8.28 As we have pointed out in paragraph 8.13 above, even the most trivial *physical* injury will be included within the definition of these offences. The width of that provision is underlined if, as we think is desirable, following the CLRC, it is made clear that unconsciousness is so included; and also if it is made clear that the causing of physical pain, without discernible alteration to the physical state of the body, is included within physical injury. Bearing in mind that the crimes with which we are concerned only extend to the intentional or reckless causing of "injury", why should all mental injury not equally be included?

8.29 This is a strong argument, on which we invite comment. We think, however, that it must be borne in mind that mental harm, unlimited in its definition, could be interpreted as covering almost all forms of alarm, distress or anxiety. These are very common conditions, and it will often be easily foreseeable, and foreseen, that unreasonable, rude or anti-social conduct will evoke such a reaction in another. For instance, an occupant of a terrace house who persistently plays very loud music will usually foresee, and may sometimes even intend, anxiety or distress on the part of his neighbours; but his conduct, deplorable though it may be, does not seem to be appropriately sanctioned by offences under the 1861 Act, or by offences under clauses 4–6 of the present Bill.

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[153] See paragraph 8.15 above.
[154] See paragraph 8.23 above.
[155] See paragraph 8.24 above.
[156] See paragraph 8.23 above.

8.30 Nor, for the reason just given, would it be a satisfactory solution for the offences under the Bill to be limited to the *intentional* infliction of mental harm.[157] Even where the accused deliberately causes injury, there seems to us a clear distinction in social and legal implications between his causing of physical bodily damage to another, and the causing of distress or anxiety. We will, however, welcome views on that issue, which, we believe, has never been thoroughly considered as a matter of English criminal policy.

Some limitation on mental harm?

8.31 If, however, it is sought to make clear that not all harm to the mind should be included within offences of injury, the problem is to identify some sensible means of limitation. The only authoritative statement of what appears to be the present law[158] puts the matter very broadly; though, as we have said, that approach might not have survived if its full implications had ever been properly explored. While any limitation will have to leave a substantial amount to judgement, we are minded to think that the line is most appropriately drawn at the identification of some sort of medically-recognised condition that goes beyond mere alarm or anxiety.

8.32 A formulation that might achieve that end is to be found in the concept of impairment of mental health, that is used, for instance, as part of the definition of "significant harm" for a wide range of purposes under the Children Act 1989.[159] The requirement of impairment of mental *health* requires a court to consider, probably with the benefit of medical advice, whether the condition has passed beyond the line that divides anxiety or distress from damage to health. Such damage need not be part of a permanent condition, but it would include, for instance, conditions such as post-traumatic stress disorder, that have been medically recognised as examples of illness and not merely emotional conditions;[160] and any other injury to the mind that could properly be described as injury to health.

8.33 We invite comment on whether limitation of harm to the mind to impairment of the victim's mental health would be a suitable means of ensuring that significant cases of injury were caught without unduly widening the ambit of criminal liability. Subject to consultation, this approach is adopted in the Bill, which provides that

> Injury means
>
> (a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition; or
>
> (b) impairment of a person's mental health.

Jurisdiction

8.34 The CLRC also recommended that it should be an offence to incite or conspire in this country to commit a serious injury abroad.[161] The present Bill is not concerned with preliminary offences, and therefore does not implement that proposal. However, we consider that, in the spirit of that proposal, and indeed for reasons of general policy, our courts should take jurisdiction over acts committed here that are intended to cause, or done

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[157] Another, and very different, offence that is dealt with in clause 12 of the Bill, torture, comprises the intentional infliction of "severe suffering", including mental as well as physical suffering. There, however, the inclusion of mental effects is not justified by the requirement of intentionality, which applies equally to the infliction of physical harm, but by the substantial degree of seriousness with which, for a serious crime, the prohibited consequences, mental and physical, are defined.

[158] See paragraph 8.23 above.

[159] e.g. detention in secure accommodation (s.25); care and supervision orders (s.31); emergency protection orders (s.44); police power to remove a child (s.46).

[160] See, for instance, the medical evidence given in recent tort cases involving "nervous shock", an example of which is to be found in *Alcock's case*, cited at n. 151 to paragraph 8.23 above, [1991] 2 WLR at pp. 818–819.

[161] CLRC, Fourteenth Report, para. 154.

recklessly with respect to, serious injury abroad: for instance, if someone in London posts a letter bomb to Paris that causes serious injury when it is opened there. Clauses 4(2) and 5(2) of the Bill ensure that such conduct will be triable in the English courts.

Consultation

8.35 We invite comment on all the matters in this section. However, we would in particular welcome views on the following specific issues:

Should the present sections 18, 20 and 47 of the 1861 Act be replaced by a scheme broadly along the lines of the recommendations of the CLRC? If not, should the present law be reformed in any way, and if so, how? (see generally paragraphs 7 and 8 above)

Are the required mental states for the new offences appropriately stated in terms of intention and recklessness as those terms are defined in clause 2 of the Bill? (see paragraphs 5 and 8.7–8.8 above)

Should the prohibited consequences of the new offences be stated in terms of "injury", or in some other way? (see paragraphs 8.9–8.12 above)

Should there be a statutory provision excluding minor injuries from the offence created by clause 6 of the Bill? (see paragraphs 8.13–8.14 above)

Should "serious" injury be defined, or be left to the judgement of the jury? (see paragraph 8.15 above)

Should "injury" include any, and if so what, injury to the mind? Would injury to the mind be satisfactorily limited by defining it in terms of "impairment of mental health"? (see paragraphs 8.20–8.33 above)

F. ASSAULT

The position before 1988

9.1 The CLRC summarised the position as it believed it to be in 1980 as follows:

> "At common law, an assault is an act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful personal violence and a battery is an act by which a person intentionally or recklessly inflicts personal violence upon another. However, the term "assault" is now, in both ordinary legal usage and in statutes, regularly used to cover both assault and battery".[162]

9.2 This analysis indicated the serious terminological confusion whereby the word "assault" is sometimes limited to what may be called psychic assault, in the sense of causing an apprehension of violence; but sometimes encompasses also the actual physical contact that is technically known as battery. That confusion is increased by the use in statutes of other terms such as "common assault". This expression, for instance as used in the second part of section 47 of the 1861 Act,[163] is presumably used to differentiate the assaults to which it refers from special cases of assault that attract specific and increased statutory penalties: for instance, the assault occasioning actual bodily harm that is dealt with in the first part of section 47 of the 1861 Act. However, it still has to be determined whether "assault" when used in either of these contexts means simply (psychic) assault, or also includes battery.

9.3 A further complication is that the CLRC believed,[164] in the company of "generations of academic and practising lawyers",[165] that assault and battery were in 1980

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[162] Fourteenth Report, para. 158.

[163] See paragraph 9.3 below.

[164] "The common law offence of common assault (which includes a battery) is, under section 47 of the Act of 1861, an indictable offence punishable with a maximum penalty of one year's imprisonment": Fourteenth Report, para. 148.

[165] *Archbold* (44th edition, 1992), First Supplement at para. 19–177, where the point is developed with great force.

common law crimes. However, in *DPP* v *Little*[166] the Divisional Court adopted the view of May LJ in *Harrow Justices, ex p Osaseri*[167] that although "assault" (here including battery) had been a common law offence until 1861, it was in that year made a statutory offence by the second part of section 47 of the 1861 Act, which read:

". . . whosoever shall be convicted upon an indictment for common assault shall be liable to be imprisoned for any term not exceeding one year".

The present law

9.4 That reading of section 47 is necessarily authoritative, but we feel obliged to say that we do not agree with it. As indicated above, the Divisional Court's view conflicts with the great weight of previous opinion, including that of the CLRC. That previous opinion appears to have been shared by the draftsman of the section, who gave no indication in his contemporary comments on section 47 that the effect of the latter part of the section was anything other than to change the penalty available for the common law crime of assault, by creating a power to award hard labour.[168] By thus simply altering the penalty for an existing common law offence the second part of section 47 would have had the same type of effect as was intended by the first part of section 47, relating to the penalty for an assault occasioning actual bodily harm, which we have discussed at length in paragraph 7 above.[169]

9.5 The court in *DPP* v *Little* was, however, directly concerned not with section 47 of the 1861 Act but with the effect of the Criminal Justice Act 1988, which repealed the part of section 47 of the 1861 Act that is quoted in paragraph 9.3 above, and provided, by section 39, that:

> "Common assault and battery shall be summary offences and a person guilty of either of them shall be liable to a fine not exceeding level 5 on the standard scale, to imprisonment for a term not exceeding six months, or to both".

This section, again, reads as if it merely provides for the level of penalty for an existing offence. However, consistently with its view of section 47 of the 1861 Act, the Divisional Court in *Little* held that section 39 of the 1988 Act was an offence-creating provision, that replaced the previous statutory offence of common assault. Moreover, and most importantly, the section made wholly clear, for the first time, that "assault" and "battery" were two separate crimes, and that an information (or a count in an indictment) charging "assault and battery" would therefore be duplicitous.

9.6 Although, however, the two offences are, in the view of the Divisional Court in *Little*, created by section 39 of the 1988 Act, that Act does not define the terms and content of those offences, which can only be determined by reference to previous case-law.

The approach of the Bill to assault and battery

9.7 The present exercise provides an opportunity to consider the formulation of these offences afresh, untrammelled by the terminological confusion, and the technical issues of statutory interpretation, that have obscured recent discussion of the present law. The principal issues are whether "assault" and "battery" should be statutorily defined; and whether the law should be presented in the form of one offence or two.

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[166] [1992] 1 All ER 299 at p. 303.

[167] [1986] QB 589.

[168] C. S. Greaves QC, *op. cit.* in n. 77 to paragraph 7.5 above, at p. 76; and see also *Russell on Crimes* (4th edition, by Greaves, 1865), vol. I at pp. 1031–1032. Section 47 as originally formulated, in 1861, continued at the end of the phrase quoted in paragraph 9.3 above with the words "with or without hard labour". This last provision was of course removed when hard labour was abolished.

[169] See in particular n. 78 to paragraph 7.5 above.

9.8 A majority of the CLRC were of the view that the law relating to "assault" (in this case including battery) was now sufficiently well understood for it not to be necessary to provide a definition. The same view appears to have been taken by the draftsman, and by Parliament, in relation to section 39 of the 1988 Act. In the Draft Code[170] we indicated that we were unable to agree with that view. As a matter of principle, a concept so important as assault, which forms the substance of a criminal offence of violence, ought to be defined, and that policy is implemented by clause 8 of the present Bill. The matter, moreover, is not merely one of principle. Although there is, we think, little controversy about the basic terms of the assault and battery offences, some aspects of that law are sufficiently undeveloped or uncertain to make statutory statement and confirmation of them highly desirable. That is particularly true of the important, but only recently fully articulated, exemption from the law of assault of what we describe below as "trivial touchings". That part of the law is set out in clause 8(2) of the Bill, and discussed in paragraphs 9.17–9.20 below. To put the matter at its lowest, it would be very odd to introduce this statutory exception to the law of assault without any statutory definition of the offence from which the conduct described in clause 8(2) was excluded.

9.9 So far as the formulation of the offence is concerned, the CLRC discussed whether there should be two separate offences: battery, and a "psychic" offence that they contemplated being expressed in terms of "threats". They however considered[171] that an offence of threats separated from the concept of immediate impact could become unduly wide; and that the creation of the two offences would create an unjustified distinction between the civil and the criminal law. They therefore thought that both aspects of "assault" should be included under the same offence, and that for that purpose "assault" should not be defined.[172]

9.10 In the Code[173] we followed the CLRC's approach of providing for a single offence, as part of our general policy of adopting the CLRC's recommendations; but we differed from the CLRC by providing that a concept as important as assault should be statutorily defined. Clause 8 of the present Bill therefore stipulates that a person is guilty of assault if:

> (a) he intentionally or recklessly applies force to or causes an impact on the body of another,
>
> (i) without the consent of the other; or
>
> (ii) where the act is likely or intended to cause injury, with or without the consent of the other; or
>
> (b) he intentionally or recklessly, without the consent of the other, causes the other to believe that any such force or impact is imminent.

9.11 We however invite comment on whether clause 8 should be divided into two separate offences. The CLRC's concern, that a non-battery offence expressed in terms of "threats" would become too wide, is not conclusive if, as in clause 8(b) of the present Bill, that offence is closely defined in terms of the causing of belief that force or impact is imminent. The creation of two clearly separate offences, whilst not making any substantive alteration in the law, might make plainer the two different types of activity that are made punishable by the present clause 8. As to terminology in that event, it would probably be easiest, and would certainly fit with normal if not necessarily at present strictly correct usage, to call physical assault simply "assault", and to reserve a term such as "threat to assault" for psychic assault, narrowly defined as in clause 8(b) of the Bill.

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[170] Clause 75.

[171] Fourteenth Report, para. 159.

[172] *Ibid.*, para. 160.

[173] Draft Code, clause 75.

9.12 As we have indicated, whatever policy is eventually adopted on this point will not affect the actual law to be applied, and we therefore in the rest of this section discuss that law in terms of clause 8 of the Bill, which provides for a single offence.

9.13 Clause 8(1) deals with the application of force or impact to the body of another. There is no need to prove injury; if such is intended, an offence is committed under clause 6. The application need not be direct; the offence covers cases of "booby traps", for instance if the defendant misleads the victim into falling into a pit.[174] Clause 8(1)(b) covers the case where there is no battery, but fear is caused of an immediate application of force: for instance if the defendant points a pistol at a person who believes it to be loaded. However, in accordance with the policy adopted by the CLRC,[175] the offence does not extend to threats to strike in the future: the threat must cause the person at whom it is aimed to believe that force or impact is imminent.[176]

9.14 The CLRC considered that, because of the comparatively minor matters with which it deals, and the availability of serious offences dealing with actual injury, assault should be a summary offence only.[177] That proposal has in fact been implemented by section 39 of the Criminal Justice Act 1988 and we incorporate that provision in the present Bill.

9.15 Clause 8 of the Bill makes special provision in respect of the consent of the victim. As discussed in paragraph 3.4 above, and further in section G below, existing common law defences based on the consent of the victim remain unaffected by the Bill, and that law will apply, for instance, to the offences in clauses 4–6 of the Bill. Strictly speaking, therefore, it is not necessary to mention consent in clause 8 either. However, the whole essence of an assault is that it is an act done without the consent of the victim. Since *non-consensual* interference is so significant an element in assault it seemed helpful specifically to mention consent in clause 8.

9.16 Clause 8 also preserves the common law rule that, in general, one cannot consent to the infliction of injury. There are some recognised exceptions to that rule, the most obvious being the boxer or the surgeon's patient. It would have been difficult, and indeed unduly limiting, to try to provide for all such cases in the Bill. They will, therefore, continue to be exempted from liability for assault by the common law; we revert to that matter in section G below.

Trivial Touchings

9.17 The definition of assault in clause 8(1) embraces in principle any touching, or threatened touching, by one person of the body of another. The subsection enacts what Robert Goff LJ, giving the judgment of the Divisional Court in the leading case of *Collins* v *Wilcock*,[178] called

> "[t]he fundamental principle, plain and incontestable, . . . that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to a battery".

But the fundamental principle is, of course, subject to exceptions. Among them, as the judgment in *Collins* v *Wilcock* went on to explain, is a

> "[broad] exception . . . created to allow for the exigencies of everyday life . . . [M]ost of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the

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[174] Cf. *Martin* (1881) 8 QBD 54.

[175] See paragraph 9.9 above.

[176] See the Code team report, at paragraph 15.47.

[177] Fourteenth Report, para. 161.

[178] [1984] 1 WLR 1172 at p. 1177C.

risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped . . . Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life".

9.18 We believe that physical contact of the kind described in *Collins* v *Wilcock* should be expressly excepted from the statutory definition of assault, in the same way as a touching that is consented to. That result is achieved by clause 8(2) of the Bill, which requires the contact that would otherwise be an assault to be "within the limits of what is acceptable as incidental to social intercourse or to life in the community". This formula directs attention to prevailing standards of social behaviour or tolerance, which are to be decided by the tribunal of fact, magistrates or a jury, trying the case. The question, we should stress, is not what the accused believes to be acceptable, but (as Lord Goff explained in *Collins* v *Wilcock*) what is *in fact* acceptable. The test is therefore an objective one. But in deciding whether, in a given case, that conduct was within the limits of what society accepts, the tribunal is likely to take into account any information that the accused had as to whether the person prima facie assaulted in fact objected to the contact involved; so, to adapt one of Lord Goff's examples in his judgment quoted in paragraph 9.17 above, if the accused knew that a particular person objected to otherwise unobjectionable back-slapping, the tribunal might well think that such conduct towards *that* person was not within the limits of what society found acceptable.

9.19 In clause 8(2) of the Bill, the reference to conduct "acceptable as incidental to social intercourse or to life in the community" replaces the shorter expression in the judgment just quoted: "generally acceptable in the ordinary conduct of daily life". That is because we think it desirable to distinguish between the private and public spheres of social existence, for two reasons. First, the standards and expectations prevailing in the former may vary according to the different spheres in which different people move. Second, "the ordinary conduct of daily life" is not an appropriate expression for encounters between police officers and citizens that, as we observe below, are in practice likely to be the most common context in which the subsection has to be considered. We appreciate that the statement of that point has led to a formulation that, in the comparatively rare cases in which these questions may arise, will require careful consideration and application by the tribunal of fact. That would, however, be true even of a shorter statement of this principle, and we consider that any difficulty of statement is outweighed by the greater flexibility afforded by the distinction drawn between private and public activity. However, we invite comment on whether it is agreed that the distinction drawn in clause 8(2) should be maintained.

9.20 Clause 8(2) is unlikely to be a frequent focus of argument or decision: people are not prosecuted in practice for trivial touchings of others. But sometimes, for instance, the question whether a police officer was acting in the execution of his duty will turn on the lawfulness or otherwise of the officer's contact with the body of a citizen whose attention he wants to attract, with whom he wishes to speak, or whom he seeks to detain or restrain.[179] Actual detention or physical restraint requires statutory warrant or a purpose justifying the use of force, and falling within clause 28 of our Bill. But the lawfulness, in any particular circumstances, of less serious contact has to be judged against "acceptable standards of conduct"[180] and would therefore in future fall to be decided under clause 8(2).

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[179] For modern cases, see *Kenlin* v *Gardiner* [1967] 2 QB 510; *Donnelly* v *Jackman* [1970] 1 WLR 562; *Ludlow* v *Burgess* (1971) 75 Cr App R 227; *Bentley* v *Brudzinski* (1982) 75 Cr App R 217; and *Collins* v *Wilcock* [1984] 1 WLR 1172, reviewing the earlier cases.

[180] *Collins* v *Wilcock* [1984] 1 WLR 1172 at p. 1178D.

Assault and alternative verdicts

9.21 The general rule governing whether an accused may be convicted of an offence other than that with which he is charged is contained in section 6(3) of the Criminal Law Act 1967, as interpreted by the House of Lords in *Wilson*, and confirmed by the House in *Savage*.[181] That provision does not, however, permit the court to find the accused guilty of a purely summary offence, however clear it may be that such an offence has in fact been committed. That rule even extends to conviction of a summary offence that might have been, but in the event was not, charged in the indictment.[182] It is plainly desirable that on a charge of causing intentional or reckless injury, under clauses 4, 5 or 6 of the Bill, or of assault to resist arrest, under clause 10 of the Bill, it should be open to convict of the summary offence of assault under clause 8 of the Bill if the evidence indicates that crime has been committed, without there being any need for a specific alternative charge of assault to have been included in the indictment. Clause 21(1) of the Bill so provides.[183]

9.22 Clause 21(2) of the Bill introduces a commonsense rule to be used in trying offences under the Bill. Intention, or knowledge, is a higher degree of fault than recklessness, and an indictment that alleges that the accused possessed either intention as to a result, or knowledge in respect of a fact, necessarily alleges that he was at least reckless as to the occurrence of the result or the existence of the fact. That point, that might otherwise give rise to unnecessary dispute, lies behind clause 21(2) of the Bill, which confirms, in applying section 6(3) of the 1967 Act to any offence under the Bill that includes an allegation of intention or knowledge, that that allegation should be taken to include an allegation of recklessness. Accordingly, the accused may be convicted of an offence under clause 5 (reckless serious injury) on an indictment that charges intentional serious injury under clause 4.

Special cases of assault

9.23 Because of its origins in many earlier statutes,[184] the 1861 Act contains a bewildering array of special offences of assault, according to the identity of the person assaulted or the task that he had in hand when assaulted.[185] The CLRC considered that such particularisation was contrary to principle, and that all such special offences should be abolished. That Committee thought that assaults on any particularly vulnerable class, for instance bus conductors or other public officials, should be recognised by the level of penalty imposed for the general offence, it being borne in mind that cases of actual injury can and should be pursued under the more serious offence of causing such injury.[186]

9.24 We fully agree with that approach. The Bill accordingly provides for the repeal of almost all of the outstanding instances of special offences of assault. Full details of our particular proposals, and of the reasons for those proposals, are given in Appendix C to this Paper.

9.25 We do, however, propose that there should be retained two special offences of assault, that were recognised by the CLRC as continuing arguably to fulfil a valuable function as separate offences. These offences are assault on a constable and assault to resist arrest. We explain the particular considerations affecting those offences in the following paragraphs.

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[181] [1984] AC 242; and [1991] 3 WLR at p. 928D.

[182] *Mearns* [1991] 1 QB 82.

[183] See further CLRC, Fourteenth Report, para. 161.

[184] See paragraphs 7.4–7.5 above.

[185] e.g., offering violence to a clergyman about to celebrate divine service (1861 Act, s.36); assaulting a magistrate concerned in preserving a wreck (*ibid.*, s.37); assault with intent to obstruct the sale or free passage of grain (*ibid.*, s.39); assault on a seaman (*ibid.*, s.40). Many other similar sections of the 1861 Act have already been repealed; details of such repeals are given in Appendix D hereto.

Assault on a constable

9.26 The CLRC discussed this offence at length in paragraphs 167–176 of their Fourteenth Report. They concluded that the special protection that the law seeks to extend to constables justifies the retention of the separate offence of assaulting a constable, on the assumption that, as clause 9 of the present Bill provides, the defendant knows that, or is reckless whether, the person assaulted is in fact a constable.

9.27 We bear in mind that we are only concerned here with *assault*: that is, the application of force without injury being caused. The more serious offences provided by clauses 4–6 of the Bill are likely to be charged in any case where the defendant causes any significant injury to a police officer. However, even though the offence of assaulting a constable may seem to overlap with the general offence of assault, we can see force in the view that to abolish the special offence might be misinterpreted as the removal of one of the present protections of police officers. There may also be some merit in retaining a separate offence as a measure of "labelling", to identify a category of conduct that the law regards as particularly serious. The CLRC considered, by a majority, and after long debate, that the offence should, like assault itself, be summary only, and subject to a maximum of six months' imprisonment.[187] That outcome may appear illogical, in that an apparently more serious species of assault attracts no higher penalty than assault generally. However, we do not see justification for any offence of *assault* being tried on indictment: a view that is reinforced by the recent reduction of assault and battery to the status of summary offences by section 39 of the Criminal Justice Act 1988.[188]

9.28 Clause 9 of the Bill accordingly implements the policy recommended by the CLRC with respect to the offence of assault on a constable. We would, however, welcome further comment in the light of the discussion by the CLRC[189] as to whether such an offence should continue to exist; and, if it does so continue, whether it should be summary only.

Assault to resist arrest

9.29 This offence was derived by the CLRC from section 38 of the 1861 Act, which makes it an offence punishable with two years' imprisonment to "assault any person with intent to resist or prevent the lawful arrest of himself or of any other person for any offence". The CLRC[190] thought that an offence on these lines should be retained because such conduct could be particularly serious from a public point of view, for instance if the assault was committed to prevent a police officer arresting a person suspected of murder; even though there would be available in such a case the offence of assault on a constable and, if any injury were caused, the offences under clauses 4–6 of the present Bill. The Committee therefore recommended an offence that, like that in section 38 of the 1861 Act, was triable either way, and had a maximum penalty of two years' imprisonment.

9.30 We see the force of those views and, provisionally, implement the CLRC's policy in clause 10 of the present Bill. We do, however, feel more concern about this offence than did the CLRC. The CLRC itself stressed that the offence should not be used where a summary offence, such as simple assault or assault on a constable, is more appropriate; and we are minded to think that in any other cases the clause 4–6 offences are likely in practice to be available. Further, whilst it is no doubt a necessary limitation on this special offence that it should apply only in the case of impeding a "lawful" arrest, it is doubtful whether specially severe sanctions should attach to the attempted prevention of arrest believed by the accused not to be lawful; whereas, on the other hand, an offence whose terms gave latitude to the accused to adjudicate on the lawfulness of the constable's conduct might not achieve the simple effect in support of law enforcement that, we assume, was the objective behind the original creation of this offence. Accordingly, while

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187 Fourteenth Report, paras. 173–176.

188 See paragraph 9.5 above.

189 Fourteenth Report, paras. 167–177.

190 Fourteenth Report, paras, 181–182.

not in any way undervaluing the need to support law enforcement that impressed the CLRC, we entertain doubts as to whether a special offence, in the terms set out in clause 10 of the Bill, is a necessary, or desirable, way of achieving that end. We therefore particularly ask for comment on whether this offence should be maintained and, if it is maintained, what the elements of the offence should be.

Assault with intent to rob

9.31 In the Draft Code we transferred this offence from section 8 of the Theft Act 1968 into the sections dealing with offences against the person.[191] We did that in pursuit of a general policy that all offences against the person should be contained in a related set of provisions. We did not, however, consider the matter in any detail,[192] and further reflection in the context of the present exercise has led us to conclude that assault with intent to rob should not be included in the present Bill.

9.32 Section 8 of the Theft Act 1968 reads:

> (1) A person is guilty of robbery if he steals, and immediately before or at the time of doing so, and in order to do so, he uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force.
>
> (2) A person guilty of robbery, or of an assault with intent to rob, shall on conviction on indictment be liable to imprisonment for life.

Section 8(2), so far as it refers to assault with intent to rob, has a long statutory pedigree,[193] but there is little authority on the exact meaning of that reference. It was, until recently, thought merely to state the penalty for a particular case of assault, but that assumption is, as in the case of assault under section 47 of the 1861 Act, called into question by *Harrow Justices ex p Osaseri*.[194] It is, however, difficult to see how a separate offence of assault with intent to *rob* can ever be committed or, at least, can ever need to be charged. Under the definition now provided by section 8(1) of the Theft Act, robbery itself is in effect theft achieved by assault. An "assault with intent to rob" will therefore either be itself a robbery or an attempted robbery; or be an assault not committed immediately before the stealing, and thus only dubiously to be sanctioned by a special and separate offence simply because of its having some connection with that stealing.

9.33 These considerations have persuaded us that assault with intent to rob is too obscure a crime, and raises too many questions about whether it should be a separate crime at all, to be conveniently dealt with, for reasons which would be ones of tidiness and not of principle, in the course of the present exercise. And, since it is hard to think that the offence is not in effect redundant, failure to pursue it further on this occasion is unlikely to lead to practical difficulties.

G. COMMON LAW RULES OR DEFENCES AFFECTING OFFENCES OF CAUSING INJURY AND ASSAULT

10.1 As we explained in paragraphs 3.2–3.4 above, common law rules or defences, and the power of the courts to determine their existence, extent and application are, as clause 1(3) recognises, not touched by the present Bill. Such rules or defences are of particular importance in relation to offences against the person. Clear examples are the common law rules relating to medical treatment and to lawful sports and games. Most of the relevant acts can, of course, be lawful only if done with the consent of the victim.[195] But even if

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[191] Draft Code, clause 78.

[192] Code Report, paragraph 14.46.

[193] It goes back, through section 42 of the Larceny Act 1861, to 7 Geo. 2, c. 21.

[194] [1986] QB 589, discussed in paragraphs 9.3–9.4 above. See further *Archbold* (42nd edition, 1992) para. 21–92.

[195] In some circumstances, a parent, or other person having parental responsibility or even simply caring for a child, may consent to medical treatment on behalf of that child.

done with consent, they are still prima facie assaults if "likely or intended to cause injury" (clause 8(1)(a)(ii)). Every blow landed in a boxing match would therefore be an offence of assault, and perhaps an offence of intentionally or recklessly causing injury (clause 6), or even serious injury (clauses 4 and 5), but for the common law defence which reflects "the accepted legality of properly conducted games and sports . . .".[196] So also with "lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc."[197]

10.2 The common law may also provide a defence to a charge of assault, or indeed of an offence involving personal injury, where an act is done upon the body of another without his or her consent. This may be the case, in particular, where action for which it is not practicable to obtain prior consent is justified in the special circumstances. An important example occurs where medical or surgical treatment is carried out in the best interests of a "victim" who, because of mental handicap or unconsciousness, is incapable of being consulted for his or her consent. Such treatment must involve an offence unless protected by a defence available at common law. That was recognised, and the relevant principle of "necessity" was discussed in some detail, by Lord Goff of Chieveley in *F* v *West Berkshire Health Authority*,[198] when the House of Lords granted a declaration that a proposed operation to sterilise a severely incompetent adult woman would not in the circumstances be unlawful. This relatively undeveloped aspect of the common law[199] will survive the enactment of the proposed Bill, with the same function that it now has.

H. THREATS TO KILL OR TO CAUSE SERIOUS INJURY

11.1 Clause 11 of the Bill is based on clause 65 of the Draft Code, which implements recommendation 63 of the CLRC.[200] The clause extends to threats to cause serious injury as well as to threats to kill, and is thus wider than section 16 of the Offences against the Person Act 1861.

I. OTHER NON-FATAL OFFENCES AGAINST THE PERSON

Introduction

12.1 Clauses 7, 12, and 14–19 of the Bill repeat various existing offences, in some cases with amendments proposed by the CLRC, without making any significant departure from the CLRC's recommendations. However, even in those cases where our proposals in effect simply reproduce the common law we think that it is appropriate that the offences should be included in this Bill. There are two reasons for following that course.

12.2 First, it should help users of the law to have as many as possible of the existing offences against the person collected in a single place; the law is thereby made more accessible. A conspicuous example of this process is the offence of torture, which is at present to be found in section 134 of the Criminal Justice Act 1988. That offence is much more appropriately located in an Act dealing specifically with offences against the person. We have therefore, following the policy adopted in the Draft Code, included in this Bill all of what we regard as the "mainline" offences. The offences that are not included here, and thus remain governed by other statutory provisions, were listed in the Code Report, and a brief explanation given of the reasons for their omission.[201]

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196 See *per* Lord Lane CJ in *Attorney General's Reference (No. 6 of 1980)* [1981] QB 715 at p. 719E.

197 See *loc. cit.*, n. 152, above. It appears from the "etc." that the Lord Chief Justice's list of activities that may be lawful although calculated, and perhaps even intended, to cause personal harm is not closed. One example that he does not mention is that of "rough and undisciplined play": *Jones* [1987] Crim LR 123.

198 *Sub nom. In re F* [1990] 2 AC 1.

199 See further Code Report, paragraph 12.41(ii); and paragraphs 3.11 above and 19.3–19.5 below.

200 Fourteenth Report, paras. 215–218.

201 See Law Com. No. 177, at paragraphs 14.58–14.60.

12.3 Secondly, inclusion of these offences in this Bill ensures that it will be clear to courts trying them that they are governed by the statutory definitions of intention or recklessness that are included in the Bill. We do not think that that will in practice make any difference to the present scope of those offences, at least if the latter are properly understood; but here again we see great benefit in there being an easily accessible statement of the mental element, to save the courts from having to speculate about the precise meaning of that element of the offences.

Administering a substance without consent

12.4 At present, the law is contained in two offences, in sections 23 and 24 of the 1861 Act, both of which deal with "unlawfully and maliciously" administering poison or a noxious thing. Section 23 deals with so acting "so as thereby" to endanger life or cause "grievous bodily harm"; section 24 with so acting "with intent to injure, aggrieve or annoy".

12.5 The CLRC considered these offences in some detail.[202] As to section 23, they pointed out that there was some considerable doubt as to the mental element required for the offence, and that conduct of the type forbidden would in any event be covered by the new offences of intentionally or recklessly causing serious injury (see clauses 4 and 5 of the present Bill). They therefore recommended that the offences should be abolished without replacement. We agree with that view, and have acted on it in schedule 4 of the present Bill.

12.6 As to section 24 of the 1861 Act, the CLRC considered that an offence of administering harmful substances without another person's consent was required, but thought that the present law could be substantially simplified, in particular by substituting, for the requirement that the defendant should act "with intent to injure, aggrieve or annoy", a provision that the defendant should know that what he administered was capable of interfering with the victim's bodily functions.

12.7 Clause 7 of the Bill makes provision in those terms. The CLRC did not put forward a legislative draft of its proposed offence,[203] but clause 7 is in the same terms as clause 73 of the Draft Code, which we believe accurately to embody the CLRC's recommendation.

Torture

12.8 Clause 12 of the Bill reflects the provisions of section 134 of the Criminal Justice Act 1988. We explained in paragraph 12.2 above why we think it desirable to take that course. Some further observations on this point will be found in paragraph 14.40 of the Code Report.

Offences of detention and abduction

12.9 These offences were reviewed in detail by the CLRC in paragraphs 225–251 of its Fourteenth Report. In clauses 79–85 of the Draft Code we implemented the CLRC's recommendations, taking particular account of any legislation that had implemented part of those recommendations. Some further observations about the method of implementing these offences were made in paragraphs 14.47–14.57 of the Code Report.

12.10 Clause 14–19 of the Bill implement the CLRC's recommendations, save where they have been overtaken by later legislation, which again is reproduced in substance in those clauses.

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[202] Fourteenth Report, paras. 184–191.

[203] See CLRC, Fourteenth Report, paras, 187–188.